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In the Supreme Court of the United States

No. 444

OCTOBER TERM, 1963.

ACE BEER DISTRIBUTORS, INC.,

Petitioner,

vs.

KOHN, INC., THE KOHN BREWERY CO., PAULINE KOHN, ADAM J. KOHN, STEPHEN ZARICH and PETER ZARICH,

Respondents.

ACE BEER DISTRIBUTORS, INC.,

Petitioner,

vs.

THE STROH BREWERY COMPANY and MORTON R. ENGEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals For the Sixth Circuit.

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TABLE OF CONTENTS.

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 4

Reasons Why the Writ Should Be Granted 11

I. The decision of the court below is in conflict with the decisions of this Court which have held that: (1) The anti-trust laws protect the opportunity of a single trader to compete in business under Section 4 of the Clayton Act; and (2) The unilateral right of customer selection and refusal to deal cannot justify unlawful conduct or agreement including a conspiracy or combination to destroy a competitor, or achieve other unlawful or unreasonable restraints of trade 11

II. The decision of the court below is in conflict with the decisions of the courts of appeal for the First, Second and Ninth Circuits 19

III. The course of decision below requires the exercise of this Court's power of supervision both by reason of an application of incorrect rules of law to completed conspiracies to restrain trade, and by further reason of the misapplication of summary procedures to allegations of fact 24

Conclusion 25

Appendices:

A. Opinion of the United States Court of Appeals For the Sixth Circuit 27

Judgment of the United States Court of Appeals For the Sixth Circuit 34

B. Statutes Involved 35

TABLE OF AUTHORITIES.

Cases.

Albert Pick-Barth Co., Inc. vs. Mitchell Woodbury Corp., demurrer overruled, 41 F. 2d 148 (1st Cir., 1930), *judgment in favor of plaintiff affirmed*, 57 F. 2d (1st Cir., 1932) 19, 20

Atlantic Heel Co. case, 284 F. 2d 879 (1st Cir., 1960) 20

Bausch & Lomb Optical Co. vs. Wahlgren, 1 F. Supp. 799 (N. D. Ill., 1932) 17

Becken, A. C., Co. vs. Gemex Corp., 272 F. 2d 1 (Seventh Cir., 1959), *cert. den.* 363 U. S. 962 (1960) 25

Binderup vs. Pathe Exchange, 263 U. S. 291 (1923) 12, 13

Federal Trade Commission vs. Sun Oil Co., 371 U. S. 505 25

Flintkote Company vs. Lysfjord, 246 F. 2d 368 (9th Cir., 1957) 24

Hitchman Coal & Coke Co. vs. Mitchell, 245 U. S. 229 (1917) 17

International Tailoring Co. vs. Lucas, 64 N. Y. S. 2d 879 (1946) 17

Klor's vs. Broadway-Hale Stores, 359 U. S. 207 (1959) 15, 20

Loewe vs. Lawlor, 208 U. S. 274 (1908) 13

Lorain Journal Co. vs. United States, 342 U. S. 143 (1951) 15

Morgan's Home Equipment Corp. vs. Martucci, 390 Pa. 618, 136 Atl. 2d 838 (1957) 17

Northern Pacific Ry. Co. vs. United States, 356 U. S. 1 (1958) 13

Packard Motor Car Co. vs. Webster Motor Car Co., 243 F. 2d 418 (D. C. Cir. 1957); *cert. den.*, 355 U. S. 822 (1957) 5

Patterson vs. United States, 222 Fed. 599 (6th Cir. 1915) *cert. den.* 238 U. S. 635 (1915) 16

Poller vs. Columbia Broadcasting System, 368 U. S. 464 (1962) 13, 14, 16, 25

Radiant Burners, Inc. vs. People's Gas, Light & Coke Co., 364 U. S. 656 (1961) 20

Radovich vs. National Football League, 352 U. S. 445 (1957) 13

Rampbell vs. Hyster, 3 N. Y. 2d 369, 144 N. E. 2d 371 (1957) 17

Schwing Motor Company vs. Hudson Sales Corporation, 138 F. Supp. 899 (D. Md. 1956); *aff'd.*, 239 F. 2d 176 (4 Cir. 1956); *cert. den.*, 355 U. S. 823 (1957) 5

Sunkist Growers, Inc. vs. Winckler & Smith Citrus Products Co., 284 F. 2d 1 (9th Cir., 1960), *modified*, 289 F. 2d 933 (1961), *reversed on other grounds*, 370 U. S. 19 (1962) 22, 24

Syracuse Broadcasting Corporation vs. Newhouse, 236 F. 2d 522 (2nd Cir., 1956) 21

Times Picayune Publishing Co. vs. United States, 345 U. S. 594 (1953) 13, 15-16

United States vs. National Retail Lumber Dealers Assn., 40 F. Supp. 448 (D. Colo. 1941) 13

United States vs. Parke-Davis, 362 U. S. 29 (1960) 15

United States vs. Socony Vacuum Oil Co., 310 U. S. 150 (1940) 16

United States vs. Yellow Cab Co., 332 U. S. 218 (1947) 12

White Motor Company vs. United States, 372 U. S. 253 (1963) 25

Texts and Articles.

Callman, Boycott & Price War: Violation of the Antitrust Laws or Unfair Competition, 23 O. St. L. Journal, 128, 141-142 17

2 *Callman, Unfair Competition* (2d Ed.) 591-593 17

2 *Ohio Jurisprudence* 2d "Agency," Sections 110 to 114, pages 167 to 171 18

Restatement of Agency, 2d, Sections 376, 381, 387, 391, 392 18

Restatement of Agency, 2d, Section 393, Comment (e) 17

Selected Antitrust Developments, 15 A. B. A., Antitrust Sections 37, 43 (1959) 18

Statutes.

Sherman Act:

Sec. 1 (15 U. S. C. 1) 3, 19, 35

Sec. 2 (15 U. S. C. 2) 21, 35

Sec. 7 (15 U. S. C. 7) 3, 35

Clayton Act:

Sec. 4 (15 U. S. C. 15) 3, 4, 11, 35

28 U. S. C. 1254(1) 2

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ACE BEER DISTRIBUTORS, INC.,

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vs.

THE STROH BREWERY COMPANY and MORTON R. ENGEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI To The United States Court of Appeals For the Sixth Circuit.

Ace Beer Distributors, Inc., petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled cases on June 11, 1963.

OPINIONS BELOW.

The opinion of the District Court is not reported. It is printed in the Appendix Record on Appeal at pages 28a to 33a, of which nine extra copies are filed herewith.

The opinion of the Court of Appeals has not yet been officially reported. An unofficial copy appears at Paragraph 70,809 of the C. C. H. 1963 Trade Cases. A copy is appended to this petition, as Appendix A (*infra*, page 27).

JURISDICTION.

The judgment of the Court of Appeals was entered on June 11, 1963 (*infra*, p. 34). The jurisdiction of this Court is invoked under the act of June 25, 1948, c. 646(1), 62 Stat. 928(1), 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Where a complaint alleges that a Michigan brewery for whom petitioner was the exclusive wholesale distributor for the Youngstown, Ohio area secretly and tortiously conspired and prearranged with another Youngstown distributor-conspirator to destroy petitioner's business and to eliminate petitioner as a competitor in such market area by secretly

(a) soliciting petitioner's trusted managerial employees to violate their duty of loyalty;

(b) inducing and arranging for such managerial employees to quit petitioner simultaneously with the termination by the brewery of petitioner's distributorship agreement and to enter the employ of such other distributor; and

(c) inducing petitioner's driver-salesmen to enter the employ of such other distributor

well knowing that, as a consequence of the execution of the conspiracy, petitioner's business would be and was in fact destroyed within a matter of hours, whether it was proper to dismiss the complaint on motion for judgment on the pleadings on the ground that the brewery had the "right" to cancel petitioner's distributorship, and that the creation and execution of the conspiracy was, as a matter of law, merely equivalent to the unilateral selection "without more" by a trader of the customer with whom he would deal.

2. Where a complaint alleges a conspiracy to destroy a distributorship busines and to suppress competition in commerce by secretly causing employees of one distributor to violate their duty of loyalty in the interest of a brewery and of another distributor who were parties to the conspiracy, "triggered" by the brewery-conspirator's giving notice of a refusal to deal, whether relief under the antitrust laws may be denied the former distributor on the ground that the destruction by conspiracy of the former's business is not an unreasonable restraint of trade.

3. Whether the erroneous course of decision below requires the exercise of this Court's power of supervision, both by reason of an application of incorrect rules of law to completed conspiracies to restrain trade and by further reason of the misapplication of summary procedures to allegations of fact.

STATUTES INVOLVED.

The statutory provisions involved are Sections 1 and 7 of the Sherman Act, Act of July 2, 1890 c. 647, Sections 1 and 7, 26 Stat. 209, 210, 15 U. S. C. Sections 1 and 7; and Section 4 of the Clayton Act, Act of October 15, 1914, c. 323, Section 4, 38 Stat. 731, 15 U. S. C. Section 15. They are printed in Appendix B, *infra*, page 35.

STATEMENT OF THE CASE.

This is a treble damage action alleging violation of the Sherman Act, brought in the United States District Court for the Northern District of Ohio, Eastern Division pursuant to Section 4 of the Clayton Act. The District Court entered a final judgment dismissing the complaint, upon respondent's motions for judgment on the pleadings, which the Court of Appeals for the Sixth Circuit affirmed.

The complaint in this case shows and alleges a secret, tortious conspiracy by a brewery engaged in interstate commerce to forestall competition with its products in a local market upon the shift of a distributorship. The brewery was not content with merely altering its distributorship arrangements. It meant to insure that upon completion of the changeover, its former distributor was commercially sterilized and without the capacity to continue in business to handle a competitive line. The thrust of the conspiracy was the transfer from petitioner to a new distributor of the sales capability of the petitioner in order to forestall competition both with the brewery's products and its new distributor.

The forestalling was accomplished by means of the preemption of the business good will and sales capacity of the entire administrative and sales organization of the predecessor distributor. The preemption was executed by means of a secret and tortious conspiracy developed over many months by the brewery and its representatives in the State of Ohio, the officers and stockholders of the prospective new distributor, and by the trusted key managerial employees of petitioner. The key employees were lured into the conspiracy by prospects of profit-sharing arrangements and options upon the stock or assets of the new distributorship, and into breaching their duty of loyalty to petitioner both by maintaining silence concerning the con-

spiracy and by inducing the driver-salesmen in petitioner's employ to leave *en masse* to work for the new distributor. The destruction of petitioner's business as an operating entity and the throttling of potential competition was a foregone conclusion since the conspirators knew that it was impossible for petitioner to rebuild its sales capability in any reasonable period of time.

The prearranged demise was "triggered" by the brewery's refusal to deal with petitioner. Simultaneously with the issuance of such refusal, the distributorship was switched to the co-conspirators, and the key employees and driver-salesmen quit petitioner's employ for the new distributor, taking with them petitioner's confidential sales data.

The grounds for the District Court's dismissal of the complaint (Tr. 28a-33a) were twofold:

1. The alleged objective to be achieved by the conspiracy was not rendered obnoxious by the Sherman Act since there was no lessening of competition, restraint of trade, or injury to the public.

2. Since the right of the manufacturer to choose with whom he will deal is not actionable unless there is present "some other factor odious to the intent of the theory behind the antitrust laws," the complaint failed to allege any cause of action. The District Court placed principal reliance upon *Schwing Motor Company vs. Hudson Sales Corporation*, 138 F. Supp. 899 (D. Md. 1956), *aff'd.*, 239 F. 2d 176 (4 Cir. 1956), *cert. den.*, 355 U. S. 823 (1957), and *Packard Motor Car Co. vs. Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir. 1957), cert. denied 355 U. S. 822 (1957).

The Court of Appeals justified the conspiracy to destroy conspirator's business by reference to the right of unilateral refusal to deal, holding "the fact that a refusal to deal with the particular buyer *without more*, may have

an adverse effect upon the buyer's business does not make the refusal to deal a violation of the Sherman Act." The Court of Appeals similarly held that the refusal to deal was not unlawful since it did not produce an unreasonable restraint of trade, such as price fixing, elimination of competition or the creation of a monopoly, i.e., no "public injury." Said the court:

> "The substitution of one distributor for another in a competitive market of the kind herein involved does not eliminate or materially diminish the existing competition of distributors of other beers, is not an unusual business procedure, and, in our opinion, is not an unreasonable restraint of trade." (Appendix A *Infra*, page 33.)

The Court of Appeals did not consider whether the refusal to deal was "tainted" by the intent to eliminate a competitor by tortious conspiracy or by the unlawful restraint resulting from the conspirators' intended and purposeful denial of a trader's right to engage in commerce.

The complaint was filed June 3, 1959 (Tr. 1a). It alleges that the petitioner, Ace Beer Distributors, Inc. ("Ace"), is an Ohio corporation, and a wholly owned subsidiary of the Genesee Distributing Co. ("Genesee"), also an Ohio corporation. Since the year 1936, Genesee and defendant Stroh Brewery Company, Inc. ("Stroh") had been operating under an agreement wherein Genesee was designated the exclusive distributor in Mahoning and Trumbull Counties, Ohio of beer and other products manufactured by Stroh. Stroh has its principal place of business in Detroit, Michigan (Complaint, Pars. 2, 3, 8; Tr. 5a, 6a, 7a).

In January, 1956, Genesee and Stroh agreed that Genesee would set up a separate organization to distribute

Stroh products exclusively. Stroh subsequently insisted upon the incorporation and formation of petitioner as a separate company, and agreed that, upon such incorporation, petitioner would be substituted as the exclusive Stroh distributor in Mahoning and Trumbull Counties, Ohio (Complaint, Par. 8; Tr. 7a).

Petitioner fulfilled every requirement of its distributorship agreement with Stroh and exerted its best efforts to sell and promote the sale of Stroh's products, and to that end petitioner incurred considerable sales and advertising expenses (Complaint, Par. 9, Tr. 7a). It leased a warehouse, purchased a cooler, warehouse and office equipment, leased trucks and a truck-trailer, and obtained the requisite permits from governmental agencies.

Respondent Stephen Zarich was petitioner's manager in charge of all operations and personnel. He was at all times in a position of great trust and responsibility, having charge and custody of all petitioner's files, records and correspondence. Zarich was in the employ of petitioner since its incorporation and prior thereto was in the employ of Genesee since January 12, 1953 (Complaint, Par. 6; Tr. 6a).

Petitioner sold Stroh's products at an annual rate of between $700,000.00 and $750,000.00. At all times referred to in the complaint, petitioner and Stroh were engaged in interstate commerce, Stroh's beer being transported from Detroit, Michigan in a regular, continuous and uninterrupted flow to distributors and ultimate users in the State of Ohio. Stroh was the only company for which petitioner acted as a distributor, and Stroh was petitioner's sole source of merchandise for distribution and sale (Complaint, Pars. 3, 11, 12; Tr. 6a, 7a).

For many months prior to April 20, 1959, The Kohn Beverage Co., and its principal officers and stockholders,

Pauline Kohn and Adam J Kohn, conspired with Stroh, Harold S. Wagoner, Stroh's Vice-President in Charge of Sales,[1] and Morton R. Engel, Stroh's Ohio Sales Manager

(a) to destroy the petitioner's business, good will and organization;

(b) to induce key employees of petitioner to breach their duty of loyalty to petitioner by joining in the conspiracy without disclosing the conspiracy to petitioner;

(c) to keep secret from petitioner and its officers the conspiracy, and each and every step thereof;

(d) to appropriate all of petitioner's employees for the direct benefit of the Kohns and their corporate organizations, with a resulting contemplated benefit to Stroh; and

(e) to eliminate petitioner as a beer distributor in interstate commerce and thereby to suppress any prospective competition in commerce with Kohn, Inc., a new corporation, in the sales of Stroh's beer (Complaint, Par. 13; Tr. 8a).

To accomplish petitioner's competitive demise, it was further agreed that Stroh would cancel respondents' distribution franchise without prior notice and would simultaneously issue a new franchise to a corporation Kohn, Inc., to be formed by the Kohn Beverage Co., Pauline Kohn and Adam J. Kohn.

In furtherance of this conspiracy, Kohn, Inc. was incorporated on March 3, 1959 with Pauline Kohn and Adam J. Kohn as principal officers and shareholders. The Kohns and the Kohn Beverage Co., under false names and without disclosing the intended purpose, negotiated a lease for

[1] Mr. Wagoner was dismissed as a defendant in the litigation since he was not a resident of Ohio. (Tr. 2a.)

a suitable building in the Youngstown area from which Kohn, Inc. could operate. These negotiations were concluded on or about April 1, 1959. The building was promptly placed in readiness for Kohn, Inc.'s operation as a Stroh distributorship. These respondents further obtained a fleet of trucks from The Kohn Beverage Co., of Akron, Ohio, which were placed in readiness to commence operations as soon as Kohn, Inc. obtained a permit from the Ohio Department of Liquor Control and as soon as petitioner's Stroh franchise was cancelled.

In January, 1959 and in each of the ensuing months until April 20, 1959, the respondents, or some of them, contacted petitioner's manager, Stephen Zarich, and also contacted his brother, Peter Zarich, Genesee's Route Superintendent, both long, trusted and key employees of petitioner and Genesee.

Through the inducements of employment and stock options in the newly formed Kohn, Inc., the Zarichs were lured into the conspiracy. Both agreed to keep secret from their respective employers the impending loss by petitioner of the Stroh distributorship. It was arranged with the Kohns that Stephen Zarich and Peter Zarich would join the staff of Kohn, Inc. upon the obtaining by Kohn, Inc. of the distributorship of Stroh's beer in Mahoning and Trumbull Counties in the State of Ohio. Stephen Zarich and Peter Zarich were also each given an option to purchase the stock or assets of Kohn, Inc. at the book value thereof, and a one-third interest in the profits of Kohn, Inc.

At the instance of the respondents, Stephen Zarich and Peter Zarich thereupon contacted petitioner's drivers and salesmen to induce these employees to leave petitioner *en masse* to become employed by Kohn, Inc. (Complaint, Par. 14; Tr. 8a-10a).

On April 20, 1959, the conspirators' plans and prior arrangements completed, Stroh "triggered" the execution of the conspiracy by cancelling petitioner's franchise for the distribution of Stroh's beer and by simultaneously shifting the sale of its merchandise to Kohn, Inc. for distribution and sale in Mahoning and Trumbull Counties, Ohio (Complaint, Par. 15; Tr. 10a).

On Stroh's cancellation of petitioner's distributorship, Stephen Zarich and Peter Zarich left their respective employments without prior notice. Similarly, all but two (2) of petitioner's drivers and salesmen without notice to petitioner quit its employ on the same day, and immediately commenced employment with Kohn, Inc. (Complaint, Par. 14, Tr. 10a).

The respondents knew at all times that in the then state of the Youngstown labor market it would be impossible for plaintiff to hire other employees with comparable training and experience, and that petitioner's business would necessarily be destroyed (Complaint, Par. 14; Tr. 10a).

Stephen Zarich, as custodian of plaintiff's business records, including customer lists, route quota records, sales quota files and other business records and documents, without petitioner's knowledge or consent, appropriated these documents, files and records and took them from petitioner's premises (Complaint, Par. 16, Tr. 10a).

Following the filing of the complaint, petitioner moved for a preliminary injunction, which the District Court denied, and this ruling was affirmed by the Court of Appeals for the Sixth Circuit without opinion, 280 F. 2d 424 (6th Cir. 1960).

Answers to the complaint were promptly filed by the various respondents and extensive discovery was undertaken by both sides. On February 20, 1961, requests for

trial was filed and on May 9, 1961 the action was pretried (Tr. 3a). After respondents made discovery of petitioner in May of 1961, petitioner moved for production and inspection of documents. This motion was opposed and motions for judgment on the pleadings were filed by all respondents other than Stroh and Engel (Tr. 3a, 4a).

In September, 1961, the District Judge granted the motions for judgment on the pleadings (Tr. 4a). Subsequently, Stroh and Engel also filed motions for judgment on the pleadings and final judgment thereon was entered on March 2, 1962. Petitioner appealed to the Court of Appeals for the Sixth Circuit, which heard argument upon the consolidated appeals on December 2, 1962 and rendered judgment on June 11, 1963.

REASONS WHY THE WRIT SHOULD BE GRANTED.

I.

The decision of the court below is in conflict with the decisions of this Court which have held that: (1) The antitrust laws protect the opportunity of a single trader to compete in business under Section 4 of the Clayton Act; and (2) The unilateral right of customer selection and refusal to deal cannot justify unlawful conduct or agreement including a conspiracy or combination to destroy a competitor, or achieve other unlawful or unreasonable restraints of trade.

The court below completely failed to distinguish between the denial to a trader of the right to sell a *particular product* by a unilateral refusal to deal "without more," and the denial of the right of a trader to sell *any product*, as a result of the destruction of the trader's business capability by conspiracy, where the refusal to deal is merely an incident of the conspiracy. Petitioner contends that Stroh had

the right "without more" to refuse to sell its products to petitioner. The rulings of this Court emphatically deny the right of Stroh under the antitrust laws to destroy petitioner's business, good will and organization and its capacity to deal in any other products by an anticompetitive conspiracy aimed at such destruction and "triggered" by a refusal to deal.

Few restraints have been more clearly delineated as competitive evils than the conspiracy or combination to eliminate a single trader from competition in commerce, especially where, as here, a substantial amount of commerce is in issue. As stated in *Binderup vs. Pathe Exchange*, 263 U. S. 291 (1923) at 312:

> "It is difficult to imagine how interstate trade could be more effectively restrained than by suppressing it. * * *"

Contrary to the settled course of the decisions of this Court, the court below held that the complaint failed to state a cause of action on account of the destruction of a competitor because the "*substitution* of one distributor for another of a single competitor in a competitive market * * * does not eliminate or materially diminish the existing competition of distributors of other beers, is not an unusual business procedure, and * * * is not an unreasonable restraint of trade." (*Infra*, p. 33, Appendix A.)

This Court has stated that the Sherman Act "is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved." *United States vs. Yellow Cab Co.*, 332 U. S. 218, 226 (1947).

This Court has also held, without examining the strength of the remaining competition, that a restraint obviously affecting "the liberty of a trader to engage in business" is within the prohibitions of the Sherman Act.

Binderup vs. Pathe Exchange, 263 U. S. 291, 312 (1923); *Loewe vs. Lawlor*, 208 U. S. 274, 293 (1908); cf. *Radovich vs. National Football League*, 352 U. S. 445, 453-454 (1957); *United States vs. National Retail Lumber Dealers Assn.*, 40 F. Supp. 448, 458 (D. Colo. 1941).

The "public injury" basis for decision articulated by the court below would appear to have been disposed of by the holding of this Court in *Poller vs. Columbia Broadcasting System*, 368 U. S. 464, 473 (1962) that:

> "To the extent that this argument suggests that there is no violation of the antitrust laws because the public will still receive the same service, it has been foreclosed by this Court's decision in *Klor's, Inc. v. Broadway-Hale Stores*, 359 U. S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959). And *if it is meant to say that there was no restraint because CBS in canceling its affiliation with WCAN was merely doing what it had a right to do and the resulting demise of WCAN followed from normal market conditions, it erroneously assumes that CBS had an absolute right despite violations of the antitrust laws to exercise its contractual privilege.*" (Emphasis supplied.)

Nor can the unlawful character of the conspiracy under the antitrust laws be shielded by petitioners failure to allege that the object of the conspiracy was to control prices or to monopolize. In *Times Picayune Publishing Co. vs. United States*, 345 U. S. 594, 622 (1953), this Court held that "even otherwise reasonable trade arrangements must fall if conceived to achieve forbidden ends * * *" The complaint in the case alleges that the purpose of the conspiracy or combination was to stifle a competitor—"the very type of thing the Sherman Act condemns." *Northern Pacific Ry. Co. vs. United States*, 356 U. S. 1 (1958) at 8. The Court of Appeals does not suggest or offer any "legitimate business aims." The allegations of the complaint

show plainly a conspiratorial disabling of petitioner not only from dealing in a *particular brand of beverage* but a destruction of plaintiff's capacity as a distributor of any beverages.

To paraphrase the holding of this Court in *Poller vs. Columbia Broadcasting System*, 368 U. S. 464, at 469, petitioner alleges "much more than the free exercise * * * of the granted right of cancellation." A conspiracy is alleged to restrain trade in the Youngstown beverage market by forestalling competition with the products of Stroh and with its new distributor, Kohn, Inc.; to eliminate petitioner from that market; and to secure petitioner's operative instrumentalities, to wit: its experienced managerial and driver-salesmen force by secret tortious means; and "the right of cancellation was merely one of the means used to effectuate this conspiracy." 368 U. S., at 469.

The distinction between a conspiracy to wreck a business or to eliminate a competitor, and the exercise "without more" of a refusal to deal is articulated in the dissenting opinion of Judge Washington in the District of Columbia Court of Appeals decision in *Poller*, 284 F. 2d 599, at 607:

> "Packard Motor Car Co. v. Webster Motor Car Co., 100 U. S. App. D. C. 161, 243 F. 2d 418, cert. denied, 355 U. S. 822 (1957), is not dispositive here. Upon loss of its franchise to sell Packard automobiles, the retailer dealer involved could use its properties in a variety of ways, including the sale of other automobiles in competition with the Packard automobile."

In its insistence upon allegations and proof of "public injury" as a prerequisite to a finding that Stroh's wrongfully exercised its right of cancellation, the Court of Appeals would appear to be plunging the law into the morass envisaged by the *Memorandum for the United States as*

Amicus Curiae on Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in *Klor's Inc. v. Broadway-Hale Stores*, 1958-76, at 5:

> "It is difficult to perceive how or at what point the lower court would determine that the elimination of individual enterpreneurs had passed permissible bounds. The (lower) court has failed to recognize that the sum-total effect of the elimination of a number of individual traders as a result of many diverse restraints is not negligible from the standpoint of public injury, even if in each case the public may patronize numerous other traders. In our view, the result of such eliminations would be a most serious encroachment on that optimum economic environment at which the Sherman Act aims. See *Northern Pacific Ry. Co. v. United States*, 356 U. S. 1, 4-5."

The Court of Appeals would recognize the unlawfulness of a refusal to deal undertaken in the interest of anti-competitive practices which pose *threats* to competitors and competition, such as price-fixing or an intent to monopolize, as in *U. S. vs. Parke-Davis*, 362 U. S. 29 (1960) and *Lorain Journal Co. vs. United States*, 342 U. S. 143 (1951). A *group* refusal to deal, as in *Klor's vs. Broadway-Hale Stores*, 359 U. S. 207 (1959), *intended* to eliminate a competitor is also viewed by the Court of Appeals as unlawful. But where, as here, the conspiratorial refusal to deal *has achieved* the exclusion of the competitor, the court below views the refusal to deal as of no significance. The result is patently unjust.

This Court has repeatedly admonished that the individual refusal of the right to deal is limited by the Sherman Act "if accompanied by *unlawful conduct or agreement* or conceived in monopolistic purpose or market control. * * *" *Times Picayune Publishing Co. vs. United*

States, 345 U. S. 594, at 625; *Poller vs. Columbia Broadcasting Co.*, 368 U. S. 464 at 469.

The complaint in the case at bar has alleged the unlawful agreement by the respondents, and the conspiracy or combination is pleaded in detail. The combination or conspiracy alleged is plainly the "unlawful agreement" or "conduct" which is the forbidden companion of the refusal to deal.

In *United States vs Socony Vacuum Oil Co.*, 310 U. S. 150 (1940), Footnote 59 this Court stated:

> "* * * And it is likewise well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring. Nash v United States, 229 U. S. 373, 378, 33 S. Ct. 780, 782, 57 L. Ed. 1232. *It is the 'contract, combination * * * or conspiracy, in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other.* See United States v. Trenton Potteries Co., 273 U. S. 392, 402, 47 S. Ct. 377, 381, 71 L. Ed. 700, 50 A. L. R. 989. Cf. Retail Lumber Dealer's Ass'n v. State, 95 Miss., 337, 48 So. 1021, 35 L. R. A., N. S., 1054. And the amount of interstate or foreign trade involved is not material (Montague & Co. v. Lowry, 193 U. S. 38, 24 S. Ct. 307, 48 L. Ed. 608), since § 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected. Steers v. United States, 6 Cir., 192 F. 1, 5. Patterson v. United States, 6 Cir., 222 F. 599, 618, 619." (Italics supplied.)

As the Court of Appeals for the Sixth Circuit stated in *Patterson vs. United States*, 222 Fed. 599, 620 (6th Cir. 1915) cert. den. 238 U. S. 635 (1915) (the *National Cash Register* case):

> "* * * We have seen that conspiracies in restraint of trade and commerce are not confined to conspiracies by competitors, or on behalf of a competitor against

a competitor. It is not even necessary that the execution of the conspiracy be of any benefit to the conspirators. *It is sufficient that it will restrain the interstate trade or commerce of the person conspired against.*" (Emphasis supplied.)

The illegality of the conspiracy or combination alleged by the complaint is aggravated by the ruthless and predatory unfair competition by which the conspiracy was executed. Although the Ohio law of unfair competition is unclear, the complaint alleges a tortious "business wrecking" by the induced removal *en masse* of the bases of petitioner's business capability, its staff of driver-salesmen. 2 *Callman, Unfair Competition* (2d Ed.) 591-593; *Morgan's Home Equipment Corp. v. Martucci*, 390 Pa. 618, 136 Atl. 2d 838 (1957); *Bausch & Lomb Optical Co. vs. Wahlgren*, 1 F. Supp. 799, 801 (N. D. Ill., 1932); *International Tailoring Co. vs. Lucas*, 64 N. Y. S. 2d 879 (1946); *A. S. Rampbell vs. Hyster*, 3 N. Y. 2d 369, 144 N. E. 2d 371 (1957); *Restatement of Agency*, 2d, Section 393, Comment (e); *Callman, Boycott & Price War: Violation of the Anti-trust Laws or Unfair Competition*, 23 O. St. L. Journal, 128 at 141-142.

As this Court held forty-five years ago in *Hitchman Coal & Coke Co. vs. Mitchell*, 245 U. S. 229, 259 (1917):

> "* * * Certainly, if a competing trader should endeavor to draw customers from his rival, not by offering better or cheaper goods, employing more competent salesmen, or displaying more attractive advertisements, but by persuading the rival's clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places, any court of equity would grant an injunction to restrain this as unfair competition."

The conspiracy alleged in the case at bar also involved the perversion of the duty of loyalty of managerial employees to disclose to petitioner material facts concerning

its business: the impending loss of the distributorship and the fact that another distributor was already active in the territory and was secretly preparing to take over not merely petitioner's product but also its operating personnel.

The tortious character of the course of conduct alleged is clear. 2 *Ohio Jurisprudence* 2d "Agency," Sections 110 to 114, pages 167 to 171; *Restatement of Agency* 2d Sections 376, 381, 387, 391 and 392.

The conspiracy and the accompanying predatory conduct alleged negate the conclusion of the court below that Stroh's "without more" refused to deal with petitioner. The limitations upon the individual lawful refusal to deal have been well-put by Professor Oppenheim in *Selected Antitrust Developments*, 15 A. B. A., Antitrust Sections 37, 43 (1959):

> "* * * a seller, acting unilaterally, has the discretion to select the person with whom he will deal or continue to deal. The over-all limitation is misuse or abuse of this discretion when there is proof of any one of a number of plus elements of liability that may taint the otherwise lawful individual refusal to deal.
>
> These plus elements include, among others, the following major species of illegality: (1) tortious conduct constituting unfair competition or unfair trade practices at common law; (2) violation of a civil rights statute or other type of constitutionality valid statute limiting refusals to deal; and (3) conduct otherwise in violation of the Sherman Act, the Clayton Act, Section 5 of the Federal Trade Commission Act or any applicable state antitrust statute."

It would seem clear that the result reached by the court below is plainly at variance with the rulings of this Court, and with the basic purpose of the antitrust laws to remove restraints upon competitors.

II.

The decision of the court below is in conflict with the decisions of the courts of appeal for the First, Second and Ninth Circuits.

The writ of certiorari should be granted in this case not only because the decision below patently conflicts with the applicable decisions of this Court, but is also in direct conflict with decisions of the Court of Appeal for the First, Second and Ninth Circuits.

In the First Circuit, the Court of Appeals has rendered a series of decisions over the last thirty years holding that a conspiracy to wreck a business by means of the tortious perversion of the duty of loyalty of trusted managerial employees, accompanied by the inducement of trained employees to leave to enter the employ of a competitor, was a conspiracy in violation of Section 1 of the Sherman Act.

In *Albert Pick-Barth Co., Inc. vs. Mitchell Woodbury Corp.*, demurrer overruled, 41 F. 2d 148 (1st Cir., 1930), *judgment in favor of plaintiff affirmed*, 57 F. 2d 96 (1st Cir., 1932), plaintiff, an interstate dealer in kitchen equipment and utensils, alleged that two of its trusted employees, having access to its records, plans and customer lists, conspired with plaintiff's competitor to destroy its business.

This conspiracy was accomplished by defendants leaving plaintiff's employ and entering into the competitor's employ taking with them the confidential records. They also induced trained employees to leave without notice and to commence employment with the competitor. Before leaving, the two employees secretly solicited plaintiff's customers on behalf of the competitor.

In overruling the demurrer, the First Circuit held (41 F. 2d 150):

> "It can hardly be said that allegations that the defendants entered into a conspiracy to restrain the competition of the plaintiff in trade and commerce among the several states, and to deprive it of its business and to obtain that business for the defendant, do not charge with substantial certainty an intent to restrain commerce and the full and free flow of interstate competition."

The Court, in affirming judgment for plaintiff on the second appeal in the *Albert Pick-Barth* case, went on to formulate the rule enunciated by this Court in *Klor's Inc. vs. Broadway Hale Stores, Inc.*, 359 U. S. 207 (1959) and *Radiant Burners, Inc. vs. People's Gas, Light & Coke Co.*, 364 U. S. 656 (1961):

> "To constitute an offense under section 1 of the Sherman Act, it is not necessary, if a conspiracy is proven, the purpose and intent of which was to eliminate by unfair means a competitor in interstate trade, to show that the public was affected, and to what extent. Nor is it necessary under this act, as it is at common law, to prove any overt acts in order to constitute the offense defined in section 1; but if overt acts are proved in furtherance of the offense defined in section 1, and any one is thereby injured in his business or property, the conspirators under section 7 of the act are liable therefor." (57 F. 2d at 102.)

The *Atlantic Heel Co.* case, 284 F. 2d 879 (1st Cir., 1960) involved a situation similar to that in the *Albert Pick-Barth* case. In the *Atlantic Heel* case, a director of the plaintiff conspired with other defendants to establish a business competitive with plaintiff, enticed the manager of plaintiff's factory and other key employees to leave plaintiff, interfered with plaintiff's source of supply and stole valuable and confidential trade secrets. The plaintiff then went on to allege "that the course of action under-

taken by defendants has had and will have the effect of eliminating plaintiff from and restraining plaintiff in its position as one of the leading concerns in the supply of leather and leather-board heels."

After reviewing the decisions of this Court, the Court of Appeals for the First Circuit concluded (284 F. 2d, at 884):

> "Viewing the conspiracy alleged in the instant case, we believe that the purpose of destroying a competitor by means that are not within the area of fair and honest competition is a purpose that clearly subverts the goal of the Sherman Act. It constitutes an interference with the natural flow of interstate commerce which would exist under conditions of fair and honest rivalry for the buyer's trade. See Package Closure Corporation v. Sealright Co., 2 Cir., 1944, 141 F. 2d 972, 977-978."

In *Syracuse Broadcasting Corporation vs. Newhouse*, 236 F. 2d 522 (2nd Cir., 1956), the Court of Appeals for the Second Circuit had before it a "refusal to deal" arising out of unit or combination advertising by two newspapers in Syracuse, New York, a refusal to accept newspaper advertising unless a defendant broadcasting company under common control with the newspapers also received advertising, the circulation of false statements concerning plaintiff, and the providing by the newspaper defendant of unfair publicity advantages to the affiliated broadcasting company which were not made available to plaintiff.

The Court of Appeals affirmed the trial court's granting of a motion for summary judgment with respect to an allegation of defendant's "intent to monopolize" in violation of Section 2 of the Sherman Act since Syracuse then had two newspapers and five radio stations, and defend-

ant's share of the total advertising revenue was too low to warrant any inference of monopolization.

The Court of Appeals reversed, however, the trial court's granting of summary judgment with respect to plaintiff's allegations that defendants conspired to put plaintiff out of business and to remove it from the scene as a competitor. Said the court (236 F. 2d at 526):

> "* * * this reasoning [with respect to 'monopolization] does not dispose of plaintiff's claim that defendants have conspired to violate the prohibition against unreasonable restraints of trade by the newspapers' unit advertising arrangement and the alleged concert of action by defendants in circulating false rumors about plaintiff, refusing to publish any praiseworthy items about WNDR, and giving discriminatory advantages to WSYR, *all for the alleged purpose of putting plaintiff out of business and removing it from the scene as a competitor*. Nor does the Times-Picayune case foreclose this issue, as the court was careful to point out that 'We do not determine that unit advertising arrangements are lawful in other circumstances or in other proceedings.' 345 U. S. at page 627, 73 S. Ct. at page 890. Moreover, the court's decision that the Times-Picayune arrangement was lawful stressed the fact that 'competitive business considerations * * * actuated the adoption of the unit rate,' that the Government did not prove an intent to restrain trade, and that the competitor newspaper was not shown to have been harmed by the arrangement. 345 U. S. at pages 614-627, 73 S. Ct. at page 888." (Italics supplied.)

In the Ninth Circuit, *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 284 F. 2d 1 (9th Cir., 1960), *modified*, 289 F. 2d 933 (1961), *reversed on other grounds*, 370 U. S. 19 (1962), involved a fact situation directly analogous to that alleged here. In that case, there were two supplier-defendants, Sunkist Growers, Inc., a

non-profit agricultural cooperative, engaged in the growing and selling of Valencia oranges, and Exchange Orange Products Co. (referred to in the opinion as "EOP"), a wholly owned subsidiary of Sunkist, engaged in the processing of Valencia oranges and the selling of juice. There were two additional conspirators, TreeSweet and Silzle, corporations engaged in the production and selling of canned Valencia orange juice. The plaintiff was a competitor of EOP, TreeSweet and Silzle in producing and selling canned Valencia orange juice. It was proved that Sunkist, EOP, TreeSweet and Silzle entered into a vertical conspiracy whereby Sunkist and EOP agreed with the two other conspirators not to sell Valencia oranges to plaintiff, but rather to sell said oranges to TreeSweet and Silzle.

The trial court instructed the jury "that EOP had a legal right to refuse to contract with Winkler *unless such refusal was some part of a violation of antitrust laws.*" The trial court then went on to give an instruction which, except for the names of the parties and the products, could be applied in *haec verba* to this case (284 F. 2d at 20 Footnote 22):

> "* * * If you find that either or both of the defendants combined with TreeSweet or Silzle to eliminate the competition of the plaintiff in the market for citrus fruit juices, particularly single-strength Valencia juice processed in California and sold in interstate commerce, and that any of the acts charged to have been performed by such defendants were performed in furtherance of such combination or conspiracy, and that the performance of any such acts was the proximate cause of any damage to the plaintiff, you should find that there was a violation of the antitrust laws

On rehearing, the Ninth Circuit merely modified its original opinion so as to eliminate any doubt as to its holding that a specific intent to injure the plaintiff need not be proved.

and proximate causation, and you should proceed to the question of damage."

The charge was held by the Ninth Circuit to be a correct statement of the law.

The ruling of the Court of Appeals for the Ninth Circuit in *Sunkist Growers* was foreshadowed in *Flintkote Company vs. Lysfjord*, 246 F. 2d 368 (9th Cir., 1957), at 376.

III.

The course of decision below requires the exercise of this Court's power of supervision both by reason of an application of incorrect rules of law to completed conspiracies to restrain trade, and by further reason of the misapplication of summary procedures to allegations of fact.

The course of decision in the courts below appears clearly to require the exercise of this Court's power of supervision. Their holdings would make nonactionable a completed conspiracy, which destroyed a competitor's business, unless plaintiff could demonstrate a resulting competitive impact of the conspiracy in the market place.

Having reached this conclusion, the lower court proceeded to compound its error. The complaint specifically alleges injury to competition both at the manufacturing level and at the wholesaler level, since the conspiracy was designed "to eliminate plaintiff as a beer distributor in interstate commerce, and thereby to suppress competition in commerce with the said Kohn, Inc. in the sale of Stroh's beer." The court nevertheless ruled that the anticompetitive effects alleged did not, *as a matter of law*, "eliminate or materially diminish the existing competition of the distributors of other beers."

The result of the lower court's ruling was to require petitioner to make a showing of "public injury" on the one

hand, while on the other, to deny it the opportunity to make its proofs. Neither common sense nor the settled rulings of this Court sanction either conclusion.

This Court has frequently admonished against the summary drawing of inferences that competition will not be adversely affected in a market area of industry. *Poller vs. Columbia Broadcasting System*, 368 U. S. 464, at 473; cf. *White Motor Company vs. United States*, 372 U. S. 253 (1963).

CONCLUSION.

Petitioner believes that the issues on this petition for writ of certiorari are of great public importance. The cases before this Court would seem increasingly to involve the relations between manufacturers and distributors. At its last term alone, this Court decided *White Motor Company vs. United States*, 372 U. S. 253 (1963), and *Federal Trade Commission vs. Sun Oil Co.*, 371 U. S. 505. Both involved manufacturer-dealer relations.

A great many small business men in the United States devote their capital and efforts to the promotion and sale of the products of others. The clear delineation of the manufacturer's right to refuse to deal is of great importance of great numbers of people. The business practices sanctioned by the courts below gravely threaten the small businessman. The courts below sanction not only the withdrawal of product by right of customer selection, but also the destruction by conspiracy of the wholesaler's capacity thereafter to continue in business.

As stated in *A. C. Becken Co. vs. Gemex Corp.*, 272 F. 2d 4, 3 to 4 (Seventh Cir., 1959), *cert. den.* 363 U. S. 962 (1960):

> "* * * A wrench can be used to turn bolts and nuts. It can also be used to assault a person in a robbery.

Like a wrench, a manufacturer's right to stop selling to a wholesaler can be used legitimately; but it *may not* be used to accomplish an unlawful purpose."

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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September 4, 1963.

APPENDIX A.

OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Appeal Nos. 14,808 and 14,974.)

Decided June 11, 1963.

Before: CECIL, Chief Judge, MILLER and O'SULLIVAN, Circuit Judges.

MILLER, Circuit Judge. The plaintiff, Ace Beer Distributors, Inc., brought this action under the Sherman Antitrust Act and the Clayton Act, Sections I, *et seq.*, Title 15 United States Code, seeking triple damages in the amount of $750,000.00 from the eight defendants, who are the appellees in these two appeals, for alleged violation of the provisions of the Antitrust Laws. Diversity of citizenship does not exist and jurisdiction is restricted to the alleged violation of the antitrust laws. Section 15, Title 15, United States Code.

Following the filing of the complaint, the plaintiff moved for a preliminary injunction which the District Judge denied. This ruling was affirmed by this Court without opinion. *Act Beer Distributors, Inc. v. Kohn, Inc., et. al.*, 280 F. (2) 424, C. A. 6th. Answers to the complaint were promptly filed by the various defendants and extensive discovery proceedings were undertaken by both sides. The action was pretried in May 1961. Thereafter, and before trial, six of the defendants, who are appellees in appeal No. 14808, concluded that the complaint did not state a claim upon which relief could be granted and on June 30, 1961, they moved for judgment on the pleadings upon the ground that the complaint failed to state a claim upon which relief could be granted. On November 8, 1961, the District Judge sustained this motion

and entered an order dismissing the action. Appeal No. 14808 followed. Two of the defendants, The Stroh Brewery Company and Morton R. Engel, its Ohio Sales Manager, did not join in the motion, but later filed their separate motion to the same effect, which the District Judge sustained by order of March 2, 1962. Appeal No. 14974 was taken from that order. The appeals have been consolidated in this Court.

Appellant's brief states in considerable detail the facts as developed by the pretrial depositions and the argument on appeal is based to a large extent upon appellant's evaluation of this testimony. Appellees not only disagree with this evaluation of the testimony but take the position that since the only question before the Court on this appeal is whether the complaint states a claim upon which relief can be granted the pretrial testimony discussed by the appellant is not before the Court and should not be considered. We are of the opinion that this is the correct view in the matter. Accordingly, our consideration of this appeal will be restricted to the allegations of the complaint.

The material allegations of the complaint are as follows: The defendant Stroh Brewery Company, hereinafter referred to as Stroh, is an Arizona corporation having its principal place of business in Detroit, Michigan. The plaintiff is an Ohio corporation and a wholly owned subsidiary of the Genesee Distributing Company, hereinafter referred to as Genesee. At the times referred to plaintiff and Stroh were engaged in interstate commerce. Stroh's beer moved from Detroit, Michigan in a regular continuous and uninterrupted flow to distributors and ultimate users in Ohio.

Since the year 1936 Genesee and Stroh had been operating under an agreement which was to be in full force and effect for an indefinite term wherein Genesee

was designated the exclusive distributor in Mahoning and Trumbull Counties, Ohio of beer and other products manufactured by Stroh. In January 1956, Genesee and Stroh agreed that Genesee would set up a separate organization to distribute Stroh products exclusively. Accordingly, Genesee caused the plaintiff, Ace Beer Distributors, to be incorporated, whereupon the plaintiff was substituted for Genesee as the exclusive Stroh distributor in Mahoning and Trumbull Counties, Ohio.

Stroh was the only company for which the plaintiff acted as a distributor and it was the plaintiff's sole source and supply of merchandise for distribution and sale. Plaintiff fulfilled every requirement of its distributorship agreement and exerted its best offorts to sell and promote the sale of Stroh's products, and to that end incurred considerable sales and advertising expenses.

The complaint alleges that thereafter the defendants maliciously conspired to destroy plaintiff's business and to eliminate plaintiff as a beer distributor in interstate commerce and that the following steps were taken to consummate said conspiracy. The defendants secretly agreed that Stroh would cancel plaintiff's distribution franchise without giving plaintiff any prior notice and would simultaneously issue a new franchise to a corporation, Kohn, Inc., to be formed by the defendants, The Kohn Beverage Company, Pauline Kohn, and Adam J. Kohn; that pursuant to this conspiracy the defendants caused Kohn, Inc. to be incorporated on March 30, 1959; that the defendants, under false names and without disclosing the intended purpose, thereafter negotiated a lease for a suitable building in the Youngstown area from which Kohn, Inc. could operate; that the defendants further obtained a fleet of trucks from the Kohn Beverage Company of Akron, Ohio which were placed in readiness to commence

operations as soon as Kohn, Inc. obtained a permit from the Ohio Department of Liquor Control and as soon as plaintiff's Stroh franchise was cancelled; that Kohn, Inc. obtained a permit from the Ohio Department of Liquor Control on April 17, 1959; that in furtherance of the conspiracy the defendants, or some of them, contacted plaintiff's manager, the defendant Stephen Zarich, a long trusted and key employee of the plaintiff, and also contacted his brother, the defendant Peter Zarich, Genesee route superintendent, who was also a long trusted and key employee, for the purpose of reaching a secret agreement with them that they would join the staff of Kohn, Inc. upon the obtaining by Kohn, Inc. of the distributorship of Stroh's beer in Mahoning and Trumbull Counties, Ohio; that at the instance of the defendants, Stephen Zarich and Peter Zarich contacted plaintiff's truck drivers and salesmen to induce them to leave the plaintiff en masse; on April 20, 1959 Stroh, tortiously and in furtherance of the conspiracy, cancelled plaintiff's franchise for the distribution of Stroh's beer and then promptly commenced selling merchandise to Kohn, Inc. for distribution and sale in Mahoning and Trumbull Counties, Ohio; that immediately after Stroh's cancellation of plaintiff's franchise, Stephen Zarich and Peter Zarich left their respective employments without any notice to their respective employers, and all but two of plaintiff's drivers and salesmen suddenly without notice to the plaintiff quit its employ on that day and immediately began employment with Kohn, Inc.; that the defendants knew that in the then state of the Youngstown labor market it would be impossible for plaintiff to hire other employees with comparable training and experience and that plaintiff's business would necessarily be destroyed, and that defendants have substantially destroyed plaintiff's business and have substantially de-

stroyed plaintiff as a beer distributor in interstate commerce.

The District Judge in a Memorandum Opinion carefully analyzed the allegations of the complaint and concluded that even if it be conceded that a conspiracy existed, the object to be achieved was not one rendered obnoxious by the Sherman Act. Relying strongly upon *Schwing Motor Company v. Hudson Sales Corp.*, 138 F. Supp. 899, affirmed 239 F. (2) 176, C. A. 4th, cert. denied, 355 U. S. 823, and *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F. (2) 418, C. A. D. C., cert. denied, 355 U. S. 822, he entered judgments dismissing the complaint as to all defendants.

In considering the issue in this case, it must be kept in mind that plaintiff is not seeking a recovery for an alleged breach of contract or damages based on any common law action for tortious interference with contract rights or for unfair competition or for any common law tort. Whether a right of damages exists in some other action based on breach of contract or tort, is not before us in this case. Whether a cause of action exists under the anti-trust laws is the sole issue in this case. In that connection it is well settled that tortious conduct against one engaged in interstate commerce or which has an effect on interstate commerce does not automatically constitute a violation of the Sherman Act. *Apex Hosiery Co. v. Leader*, 310 U. S. 469; *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127; *Hunt v. Crumboch*, 325 U. S. 821.

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: * * *" Section 2 of the Act makes illegal any

conspiracy to monopolize any part of the trade or commerce among the several states. Section 15 confers a right of action for triple damages upon any person injured in his business or property by reason of anything forbidden in the antitrust laws.

In essence, the complaint charges that the defendants conspired to destroy plaintiff's business and to eliminate it as a beer distributor in interstate commerce and that this result was accomplished by the termination by Stroh of plaintiff's franchise as its beer distributor and thereafter conducting its business through another distributor. Paragraphs 13 and 17 of the complaint.

That, without the results proscribed by the Sherman Act, is not a violation of the Act. A manufacturer has a right to select its customers and to refuse to sell its goods to anyone, for reasons sufficient to itself. *United States v. Colgate & Co.*, 250 U. S. 300. A refusal to deal becomes illegal under the Act only when it produces an unreasonable restraint of trade, such as price fixing, elimination of competition or the creation of a monopoly. *United States v. Parke, Davis & Co.* 362 U. S. 29, 32; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U. S. 211; *Lorain Journal Co. v. United States*, 342 U. S. 143. The fact that a refusal to deal with a particular buyer without more, may have an adverse effect upon the buyer's business does not make the refusal to deal a violation of the Sherman Act. Damage alone does not constitute liability under the Act.

The present case does not involve price fixing. Nor does it involve an attempt to create a monopoly. The Stroh Brewery Company had one distributor in the territory under consideration before it terminated the plaintiff's franchise. It continued to have only one distributor thereafter. There is no allegation or contention that the beer of other breweries was not just as available in that area

after the change in distributors as it was before. See: *United States v. E. I. du Pont de Nemours & Co.*, 351 U. S. 377.

Unless it can be said that the refusal to deal with plaintiff had the result of suppressing competition and thus constituted "restraint of trade" within the meaning of Section 1 of the Sherman Act, there is no violation of the Act. We do not think that the substitution by Stroh Brewery Company of one distributor for another had this result.

It is well settled that the "restraint of trade" referred to in Section 1 of the Act, means only unreasonable restraint of trade, in that, as the cases point out, every commercial contract has some restraining effect upon trade. *Standard Oil Co. v. United States*, 221 U. S. 1, 51; *United States v. American Tobacco Co.*, 221 U. S. 106, 179-180; *Chicago Board of Trade v. United States*, 246 U. S. 231, 238-239. The substitution of one distributor for another in a competitive market of the kind herein involved does not eliminate or materially diminish the existing competition of distributors of other beers, is not an unusual business procedure, and, in our opinion, is not an unreasonable restraint of trade. *Hohensee v. Akron Beacon Journal Publishing Co.*, 171 F. Supp. 90, 174 F. Supp. 450, affirmed 277 F. (2) 359, C. A. 6th, cert. denied, 364 U. S. 914; *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 214 F. (2) 891, C. A. 5th, cert. denied, 348 U. S. 912.

Plaintiff relies strongly upon *Klor's v. Broadway-Hale Stores*, 359 U. S. 207, and two cases from this Court, *Englander Motors v. Ford Motor Co.*, 267 F. (2) 11, C. A. 6th and *Crane Distributing Co. v. Glenmore Distilleries*, 267 F. (2) 343, C. A. 6th. The factual differences between those cases and our present case are very material. The *Klor* case involved a group boycott or concerted refusal by a number of traders to deal with a single trader.

It was not, as the opinion expressly stated (p. 212) a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Both the *Englanders Motors* case and the *Crane* case involved price fixing. Their rulings are accordingly not applicable to the present case.

We are of the opinion that the District Judge was not in error in dismissing the complaint. *Schwing Motor Company v. Hudson Sales Corp.*, *supra*, 138 F. Supp. 889, affirmed 239 F. (2) 176, C. A. 4th, cert. denied, 355 U. S. 823; *Packard Motor Car Co. v. Webster Motor Car Co.*, *supra*, 243 F. (2) 418, C. A. D. C., cert. denied, 355 U. S. 822; *Parmelee Transportation Co. v. Keeshin*, 292 F. (2) 794, C. A. 7th, cert. denied, 368 U. S. 944, rehearing denied, 368 U. S. 972.

The judgments are affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Like Orders Filed June 11, 1963 in Appeal Nos. 14,808 and 14,974.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

s/ SHACKELFORD MILLER, JR.
United States Circuit Judge.

APPENDIX B.

STATUTES INVOLVED.

Sherman Act.

"1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * *

"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *

"7. The word 'person,' or 'persons,' wherever used in Sections 1-7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Clayton Act.

"4. Any person who shall be injured in his business or property by reason of any thing forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Supreme Court, U.S.
FILED
OCT 25 1963
JOHN F. DAVIS, CLERK

No. 444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

ACE BEER DISTRIBUTORS, INC.,
Petitioner,

vs.

KOHN, INC., THE KOHN BEVERAGE CO.,
PAULINE KOHN, ADAMS J. KOHN,
STEPHEN ZARICH and PETER ZARICH,
Respondents.

ACE BEER DISTRIBUTORS, INC.,
Petitioner,

vs.

THE STROH BREWERY COMPANY and
MORTON R. ENGEL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS STROH BREWERY COMPANY AND MORTON R. ENGEL IN OPPOSITION

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INDEX

	Page
Opinions Below	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Argument	8
I. The decision below does not conflict with the decisions of this Court	9
II. The decision below does not conflict with the decisions of other Courts of Appeals	12
III. The decision below is clearly correct	15
Appendix:	
Complaint in Cause No. 35309	A1

CITATIONS

Cases	Page
Apex Hosiery Co. v. Leader, 310 U. S. 469, 84 L. ed. 1311	15
Atlantic Heel Co., Inc. v. Allied Heel Co., (CA 1, 1960) 284 F. 2d 879	13
Binderup v. Pathe Exchange, 263 U. S. 291	11
Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U. S. 127, 129 L. ed. 464	15
Federal Trade Comm. v. Sun Oil Co., 371 U.S. 505	11
Hunt v. Crumboch, 325 U. S. 821, 89 L. ed. 1954	15
Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U. S. 207	11
Loewe v. Lawlor, 208 U. S. 274	11
Lorain Journal Co. v. U. S., 342 U. S. 143	11
Mitchell Woodbury Corp. v. Albert Pick-Barth Co., Inc., (CCA 1, 1930) 41 F. 2d 148, (CCA 1) 57 F. 2d 96	12
Northern Pacific Ry. Co. v. U. S., 356 U. S. 1	11
Packard Motor Car Co. v. Webster Motor Car Co., (CA DC, 1957) 243 F. 2d 418, cert. den. 355 U. S. 822	16
Parmelee Transportation Co. v. Keeshin, (CA 7, 1961), 292 F. 2d 794, cert. den. 368 U. S. 944, rehearing den. 368 U. S. 972	16
Poller v. Columbia Broadcasting System, 368 U. S. 464, 7 L. ed. 2d 458, 462	8, 9, 12
Radiant Burners, Inc. v. People's Gas, Light & Coke Co., 364 U. S. 656	11

	Page
Radovich v. *National Football League*, 352 U. S. 445	11
Schwing Motor Co. v. *Hudson Sales Corp.*, 138 F. Supp. 899, affirmed 239 F. 2d 176, cert. den. 355 U. S. 823	15
Sunkist Growers, Inc. v. *Winckler & Smith Citrus Products Co.*, (CA 9, 1960) 284 F. 2d 1	15
Syracuse Broadcasting Corporation v. *Newhouse*, (CA 2, 1956) 236 F. 2d 522	14
Times-Picayune Pub. Co. v. *U. S.*, 345 U. S. 594	12
U. S. v. *Parke, Davis & Co.*, 362 U. S. 29	11
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150	11
U. S. v. *Yellow Cab Co.*, 332 U. S. 218	12
White Motor Co. v. *U. S.*, 372 U. S. 253	11

STATUTES

Sherman Act	
Section 1 (15 U.S.C., Sec. 1)	2, 8, 9, 11
Section 2 (15 U.S.C., Sec. 2)	3, 9
Robinson-Patman Act	
15 U.S.C., Sec. 13	12

IN THE

Supreme Court of the United States

NO. 444

OCTOBER TERM, 1963

ACE BEER DISTRIBUTORS, INC.,
Petitioner,

vs.

KOHN, INC., THE KOHN BEVERAGE CO., PAULINE KOHN, ADAMS J. KOHN, STEPHEN ZARICH and PETER ZARICH,
Respondents.

ACE BEER DISTRIBUTORS, INC.,
Petitioner,

vs.

THE STROH BREWERY COMPANY and MORTON R. ENGEL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS STROH BREWERY COMPANY AND MORTON R. ENGEL IN OPPOSITION

Respondents, Stroh Brewery Company and Morton R. Engel, oppose the granting of certiorari herein on the ground that there is no special or important reason for granting certiorari and, specifically, that the decision of the Court of Appeals relates solely to the sufficiency of the unique Complaint involved herein, does not conflict with

applicable decisions of this Court or of other Courts of Appeals and that no important question of federal law is presented.

OPINIONS BELOW

Petitioner, as plaintiff, instituted two successive actions in the same District Court against Respondent Stroh.* The first, No. 35,300, was filed on May 11, 1959, and the second, No. 35,365, on June 11, 1959. Denial of preliminary injunction in each was previously appealed to the Court of Appeals (Nos. 14,025 and 14,026). The Court of Appeals affirmed the denials without opinion at 280 F. 2d 424.

After remand, and after discovery and pretrial, the District Court dismissed cause 35,365. The opinions as to the District Court's dismissal and as to the affirmance thereof by the Court of Appeals are noted in the Petition. The opinion of the Court of Appeals is reported at 318 F. 2d 283.

QUESTIONS PRESENTED

1. Whether Petitioner's Complaint in cause 35,365 states a claim for treble damages under Section 1 of the Sherman Act, or whether Petitioner's only claim is his prior claim for simple and punitive damages for common law tort asserted in pending cause 35,300.

2. Whether a claim under Section 1 of the Sherman Act is stated in a Complaint alleging that:

a. Petitioner was incorporated solely to distribute Respondent's products. Petitioner's only business was the distribution of such products, and Petitioner was the exclusive distributor for such products but only in two counties, each in the State of Ohio.

*Hereinafter referred to as "Respondent," Respondent Engel being an employee of Stroh.

b. Respondent, whose right to do so is conceded herein by Petitioner, terminated Petitioner as such distributor and substituted a new distributor as the only Stroh distributor in the two counties.

c. The new distributor acquired Petitioner's manager, a route superintendent of Petitioner's parent corporation and some of Petitioner's employees and in so doing allegedly committed common law torts.

d. Said termination of Petitioner and claimed wrongful acquisition of Petitioner's employees were the result of a "conspiracy" between Respondent and the substituted distributor.

3. Whether the decision of the Court of Appeals presents any special or important reason justifying certiorari.

STATUTES INVOLVED

Petitioner's claims under Section 2 of the Sherman Act were abandoned on appeal, Section 2 is not involved and should not have been included in the Petitioner's Appendix.

STATEMENT OF THE CASE

Until the dismissal order complained of, Petitioner had pending two actions against Respondent in the same District Court. The Complaints were essentially the same, each alleging the same operative facts and each seeking to enjoin Respondent from selling beer to the new distributor. Petitioner's first action (Cause 35,300) was filed May 11, 1959, was grounded on diversity, claimed no adequate remedy at law, characterized the claimed wrongful acts as a "tortious destruction of Plaintiff's business" and sought simple and punitive damages. Petitioner's second action (Cause 35,365) was filed June 3, 1959, asserted that it was grounded on the

Sherman and Clayton Acts, and sought treble damages. The first action is still pending. Certiorari is sought as to the affirmance of the dismissal of the second. The Complaint in the first action is printed herein at Appendix pages A1-A8, *post*, and the Complaint in the second at pages 5a-12a of Petitioner's Appendix Record On Appeal filed herein.

The second Complaint* does not allege that after the substitution of distributors Petitioner ever distributed, or intended to distribute, or had any prospect of distributing, beer in interstate or intrastate commerce. To the contrary, the Complaint affirmatively alleges that Petitioner was formed solely to distribute Stroh beer, distributed only Stroh beer and that Petitioner's only business was as the exclusive Stroh beer distributor for Mahoning and Trumbull Counties, each in the State of Ohio (Paragraphs 8 and 11; pages 6a-7a).

The Complaint does not allege that Petitioner and the new distributor were competitors in the distribution of Stroh beer. To the contrary, it alleges that Petitioner was the exclusive distributor for the counties involved, that the new distributor was a newcomer to the market area and was formed to distribute Stroh beer in said counties, that Petitioner's franchise was cancelled and Respondent "then promptly commenced selling" to the new distributor and that Petitioner's business was destroyed (Paragraphs 8, 14(b), 15, 17; pages 6a, 7a, 8a, 10a).

Nor does the Complaint allege that Petitioner and the new distributor were competitors in the distribution of any other beer. To the contrary, it alleges that Petitioner was formed solely to distribute Stroh beer, Stroh was its "sole source of supply of merchandise for distribution and sale" and that the new distributor was formed for the same

*Hereinafter meaning the Complaint in Cause 36, 365.

limited purpose and replaced Petitioner (Paragraphs 8, 11, 15; pages 6a, 7a, 10a).

Nor does the Complaint allege that Petitioner was, or had any intention of becoming, or had any prospect of becoming, in any way a competitor of Respondent or of the new distributor. Although Petitioner now argues as if competition were involved and as if trade were restrained, the Complaint that Petitioner actually filed shows on its face that Petitioner's sole business was as an exclusive distributor for a single product, that this business was transferred to a newcomer who entered the area, and that Petitioner's business terminated. Fairly read in its entirety the Complaint alleges only the natural consequences of the substitution as the only effects upon trade or commerce. Petitioner concedes that the transfer of the franchise from one distributor to another was Respondent's right (Petition, pages 11-12). The Complaint seeks, as does the still pending prior Complaint, damages for alleged common law torts of piracy of employees and records, and of inducing breaches of fiduciary duty, but by claiming, and seeking damages for, a claimed total destruction of its business Petitioner has affirmatively alleged itself out of the area of active trade, commerce and competition to which the Sherman Act is directed.

The District Court summarized the situation:

> "The practical result of all the events narrated is the substitution of one distributor for another. We cannot find in this a lessening of competition, a restraint of trade, or an injury to the public. Abstracting from personalities, how has the economic picture been changed? There still remains one distributor no more nor less free to dictate the condition of the market. An economist's chart of distribution would

remain unchanged. The Sherman Act deals with the economic realities of the market and not with the personalities involved. There is no claim stated under Section 1 of the Sherman Act." (Page 33a of Appendix Record on Appeal filed by Petitioner).

The Court of Appeals likewise summarized the situation:

"• • • Whether a right of damages exists in some other action based on breach of contract or tort, is not before us in this case. Whether a cause of action exists under the anti-trust laws is the sole issue in this case. In that connection it is well settled that tortious conduct against one engaged in interstate commerce or which has an effect on interstate commerce does not automatically constitute a violation of the Sherman Act. • • • (citing cases)" (Appendix to Petition, page 31).

• • •

"The present case does not involve price fixing. Nor does it involve an attempt to create a monopoly. The Stroh Brewery Company had one distributor in the territory under consideration before it terminated the plaintiff's franchise. It continued to have only one distributor thereafter. There is no allegation or contention that the beer of other breweries was not just as available in that area after the change in distributors as it was before. See: *United States* v. *E. I. du Pont de Nemours & Co.*, 351, U.S. 377." (Appendix to Petition, pages 32-33).

• • •

"It is well settled that the 'restraint of trade' referred to in Section 1 of the Act, means only unreasonable restraint of trade, in that, as the cases point out, every commercial contract has some restraining effect upon trade. • • • (citing cases) The substitution of one distributor for another in a competitive market of the kind herein involved does not

eliminate or materially diminish the existing competition of distrbutors of other beers, is not an unusual business procedure, and, in our opinion, is not an unreasonable restrain of trade. * * * (citing cases)." (Appendix to Petition, page 33).

ARGUMENT

The decision of the Court of Appeals sets forth at length the particular, and unique, allegations of the Complaint. It expressly reserves judgment as to "whether a right of damages exists in some other action." It notes that there was one distributor for Stroh beer both before and after the change, and that "there is no allegation or contention that the beer of other breweries was not just as available in that area after the change in distributors as it was before." It concludes only that the District Judge was not in error in dismissing this particular Complaint. The decision is carefully and narrowly confined. It presents no conflict with decisions of this Court or of other Courts of Appeals, no important questions of federal law and no special or important reasons justifying certiorari. For Petitioner it means it is tied to the form of action it initially selected and to the theory that it actually alleged in both Complaints.

The burden of bringing its action within the ambit of Section 1 of the Sherman Act is upon Petitioner. If Petitioner's claim, fairly read, is not that interstate trade or commerce was restrained, Petitioner has not stated a claim under that act, regardless of whether or not Petitioner has stated some other kind of a claim. Herein, Petitioner, of necessity, concedes that the substitution of exclusive distributors was Respondent's right. The business Petitioner thereby lost was Petitioner's sole business and Section that of the newcomer in the market. This, as both lower courts noted, was a mere substitution and by its nature could have no effect on interstate trade or commerce.

"As I see it, this is one of those cases, not unfamiliar in treble-damage litigation where injury resulting from normal business hazards is sought to be made redressable by casting the affair in antitrust terms." Justice Harlan, dissenting, in *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 478.

In an effort to place upon Respondents the burden of negating Sherman Act consequences that Petitioner has not even alleged, Petitioner has throughout, and particularly in his Petition herein, taken the position that such consequences are assumed in any refusal to deal case unless it appears that the refusal was a mere "unilateral refusal to deal 'without more'" (Petition, page 11). From this springboard, Petitioner jumps to the conclusion that its allegations of "conspiracy" and of *intra*state common law torts as between the market newcomer and the supplanted distributor (with, perhaps, personal but certainly not interstate commerce consequences) are a magic "more", and that Respondent therefore cannot sustain its presumed burden. On this assumed basis, Petitioner then claims that the decision below conflicts with those decisions where the Complaints involved clearly did charge a conspiracy to restrain, or a "more" which restrained, interstate commerce.

I

The decision below does not conflict with the decisions of this Court.

Poller v. Columbia Broadcasting System, 368 U.S. 464, 7 L.ed 2d 458, 462, relied upon by Petitioner at pages 13, 14, 16 and 25 of its Petition, is not in point. The only question was the propriety of summary judgment. The sufficiency of the Complaint under Sections 1 and 2 of the Sherman Act was beyond question. It squarely alleged an interstate, in fact a nationwide, restraint and attempt to monopolize:

> . . . A conspiracy is alleged to restrain trade in the Milwaukee television market; to eliminate WCAN from that market; to secure its facilities at depressed prices; and to occupy the UHF band in that market exclusively. The right of cancellation was merely one of the means used to effectuate this con

> spiracy. Moreover, 'in its wider sense' Poller claims that a part of their conspiracy was 'to wipe out the most outstanding UHF operator in the country [WCAN] and by wiping him out they destroyed the UHF industry, which was a threat to them, despite their protestations, because of the enormous economic investment they had in VHF.'
>
> . . .
>
> It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that 'it is quite clear what the truth is.'"

The incomplete quotation emphasized by Petitioner at page 14 of its Petition clearly identifies the "violations of the anti-trust laws" referred to in the quoted portion by referring, in the portion *not* quoted, back to the claims hereinabove set forth and to the "additional claim that part of the conspiracy was the destruction of UHF broadcasting entirely."

Had the lower courts herein found that Petitioner had alleged that the termination of Petitioner was part of a plan to eliminate all competing *beers* in the Youngstown market, and ultimately in the national market, and had then concluded that no claim under the Sherman Act had been alleged the decision then would have conflicted with the decisions of this Court. Both lower courts, however, found that no such, or similar, claim had been made and, to the contrary, that the result of all that was pleaded in the Complaint was the claim of substitution of one distributor for another with no other claimed effects on the market. In particular, Petitioner's paraphrase of *Poller* at page 14 of its Petition is squarely contrary to the facts herein.

Petitioner's attempt to characterize the decision of the court below as based on a "public jury" requirement is

clearly an attempt to set up, and then destroy, a false premise (Petition, page 13). The court said that Stroh had one distributor before the substitution and one after; that Petitioner does not claim that the availability of other beers was affected by the substitution, and that the substitution of one distributor for another in a competitive market is not a restraint of trade under the Sherman Act where it does not affect competition. This is not a requirement of "public injury." It is a requirement that trade, commerce or competition be somehow alleged to be affected before a Sherman Act violation is indicated. It is only a conspiracy "in restraint of trade or commence" which 1 of the Sherman Act strikes down (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, Footnote 59).

In fine, the decision below not only does not conflict with, but clearly recognizes, that had the substitution complained of been alleged to have been part of any plan unreasonably to restrain trade or commerce an antitrust violation would have been alleged, whether the plan involved price fixing,[1] group boycott,[2] group boycott and conspiracy to monopolize,[3] attempt to monopolize,[4] price fixing and territorial and customer limitations,[5] tie-in arrangements,[6] discriminatory prices,[7] conspiracy to monopolize and to restrain trade

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[1] *U.S. v. Parke, Davis & Co.*, 362 U.S. 29, Petition, page 15 and *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, Petition, page 16.
[2] *Loewe v. Lawlor*, 208 U.S. 274, Petition, page 13, *Radiant-Burners, Inc. v. People's Gas, Light & Coke Co.*, 364 U.S. 656, Petition, page 20; *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, Petition, pages 15, 20 and *Binderup v. Pathe Exchange*, 263 U.S. 291, Petition, pages 12, 13.
[3] *Radovich v. Nat. Football League*, 352 U.S. 445, Petition, page 15.
[4] *Lorain Journal Co. v. U.S.*, 342 U.S. 143, Petition, page 15.
[5] *White Motor Company v. U.S.*, 372 U.S. 253, Petition, page 25.
[6] *Northern Pacific Ry. Co. v. U.S.*, 356 U.S. 1, Petition, page 13.
[7] *Federal Trade Comm. v. Sun Oil Co.*, 371 U.S. 505, Petition, page 25.

and destroy an entire industry,[8] an agreement not to compete and a conspiracy to preclude purchasers from buying in open market,[9] or a tie-in arrangement and attempt to monopolize.[10]

The foregoing categories and the footnoted list of cases include all of the decisions of this Court relied on by Petitioner. Each involved a classic example of restraint of trade or of monopolization or of violation of the Robinson-Patman Act. The decision below that the substitution of one distributor for another distributor without other alleged restraint of trade, monopoly or antitrust effects clearly is not in conflict with any of these decisions.

II.

The decision below does not conflict with the decisions of other Courts of Appeals.

Petitioner cites general language from four claimed conflicting decisions. Inspection of the decisions, however, reveals that the Complaints involved squarely charged precisely what the courts below have found the Complaint herein did not, a violation of the antitrust laws.

Mitchell Woodbury Corporation v. Albert Pick-Barth Co. Inc., (CCA 1, 1930) 41 F.2d 148, 149-151.

"The declaration alleges that the plaintiff was engaged in interstate commerce; that the defendant corporation was one of a combination of corporations * * * engaged in the same business as the plaintiff, and constituted the largest and a dominating factor in that trade throughout the United

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[8] *Poller v. Columbia Broadcasting System*, 368 U.S. 464. Petition, pages 13, 14, 16, 25.

[9] *U.S. v. Yellow Cab Co.*, 332 U. S. 218. Petition, page 12.

[10] *Times-Picayune Publishing Co. v. U.S.*, 345 U.S. 594. Petition, pages 13, 15-16

States; * * * that said defendants entered into conspiracy to deprive the plaintiff of its interstate business in its kitchen equipment and utensils, and to restrain the competition of the plaintiff with the defendant corporation and destroy its business in the several states, * * * the fair inference is that it was its interstate kitchen department business that it alleges was injured and diminished.

"* * * the defendant corporation is, in effect, charged, in conjunction with the other defendants, with a purpose, and acts in furtherance of that purpose, of eliminating the plaintiff as an interstate competitor.

"It can hardly be said that allegations that the defendants entered into a conspiracy to restrain the competition of the plaintiff in trade and commerce among the several states, and to deprive it of its business and to obtain that business for the defendant, do not charge with substantial certainty an intent to restrain commerce and the full and free flow of interstate competition. " * * (citing cases)"

Atlanta Heel Co., Inc. v. *Allied Heel Co.*, (CA 1, 1960) 284 F.2d 879, 880, 884-5.

"Plaintiff appellant, Atlantic Heel Co., Inc., filed a complaint alleging that plaintiff is a Massachusetts corporation engaged in the manufacture and sale of leather and leatherboard heels; * * * and has a substantial share of the interstate business in the related lines of merchandise.

"The complaint further alleges that defendants conspired and are conspiring to restrain the plaintiff in its interstate and foreign business, more particularly that defendants conspired to destroy plaintiff in its interstate and foreign business, * * * that course of action undertaken by defendants has had and will have the effect of eliminating plaintiff from and restraining plaintiff in its position as one of the leading concerns in the supply of leather and leather

board heels; that such elimination and restraint will injure the interests of the public and the trade * * * with a resultant harmful effect on prices and on the availability of choice to customers in the trade. * * *"

"Woodbury, Chief Judge, and Aldrich, Circuit Judge (concurring).

"Judge Aldrich and I concur in the result but see no occasion at this stage of the case to express wholehearted endorsement of the rule laid down by this court in *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 1 Cir., 1932, 57 F.2d 96, 102. It may be that the case is good law but it was unique on its facts in 1932 and so far as we can determine it stands alone today. At this stage of the instant case there is no need for us to commit ourselves definitely on the Pick-Barth rule."

Syracuse Broadcasting Corporation v. *Newhouse*, (CA 2, 1956) 236 F.2d 522, 524-525.

"This action is predicated on the following alleged violations of the antitrust laws: (1) Restraining trade in, monopolizing, and attempting to monopolize the dissemination of news and advertising in the Syracuse area in violation of 15 U.S.C.A. §§1 and 2 (Sherman Act) by means of the following acts: (a) refusing to accept newspaper advertisements unless WSYR also received advertising; (b) refusing to accept national or 'general' advertising in either newspaper separately, but requiring unit or combination advertising in both newspapers; (c) circulating false statements concerning WNDR; and (d) providing advantages in the newspapers to WSYR which were not provided to WNDR, such as favorable publicity, free advertising, preferred page position for advertising and secret refunds and rebates. (2) Discriminating in price, by means of the above-stated acts, in violation of 15 U.S.C.A. §13 (Clayton Act). (3) Merging and employing interlocking direc-

torates in violation of 15 U.S.C.A. §§ 18 and 19 (Clayton Act). * * * ".

Sunkist Growers, Inc. v. *Winckler & Smith Citrus Products Co.*, (CA.9, 1960) 284 F.2d 1, 5.

"Appellees allege in their first cause of action (Section 1 of the Sherman Act; 15 U.S.C.A. §1), and appellants deny, that appellants have conspired and entered into contracts which had the purpose and effect of unreasonably restraining interstate commerce in canned California citrus fruit juice, particularly single strength orange juice. This was proved, say appellees, by 'six acts.' * * *" [The six acts include discrimination in services, prices and contracts].

III.

The decision below is clearly correct.

An alleged wrong does not become a Sherman Act violation merely because it is inflicted on one engaged in commerce or because it impairs or destroys his competitive ability.

Apex Hosiery Co. v. *Leader*, 310 U.S. 469, 486-487, 84 L. ed 1311, 1319.

Hunt v. *Crumboch*, 325 U.S. 821, 826, 89 L. ed 1954.

Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 129 L. ed 464.

A substitution of one distributor for another with no other effect on the market involved, or upon trade, commerce or competition therein, has no Sherman Act consequences, although it may have serious personal consequences to the distributors involved.

Schwing Motor Company v. *Hudson Sales Corporation*,

138 F. Supp. 899, affirmed 239 F.2d 176, certiorari denied 355 U.S. 823.

Packard Motor Car Company v. *Webster Motor Car Company*, (CA DC, 1957) 243 F.2d 418, certiorari denied 355 U.S. 822.

Parmelee Transportation Company v. *Keeshin*, (CA 7, 1961) 292 F. 2d 794, 804, certiorari denied 368 U.S. 944, rehearing denied 368 U.S. 972.

> "* * * However, the use of conventional antitrust language in drafting a complaint will not extend the reach of the Sherman Act to wrongs not germane to that act, even though such wrongs be actionable under state law. We are not concerned with labels. Otherwise, an adroit antitrust lawyer might use his skill in the use of words to convert many unlawful acts into antitrust violations. The antitrust laws were never meant to be a panacea for all wrongs."

It is respectfully submitted that Certiorari should be denied.

Respectfully submitted,

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Dated October 25, 1963

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ACE BEER DISTRIBUTORS, INC.
an Ohio corporation
58 Hubbard Road
Youngstown, Ohio

Plaintiff.

—vs.—

No. 35,300

STROH BREWERY COMPANY, INC.
an Arizona corporation,
909 East Elizabeth Street
Detroit, Michigan

Defendant.

COMPLAINT

(Filed May 11, 1959)

1. This action arises by reason of diversity of citizenship by and between the plaintiff, a corporation organized under the laws of, and doing business in, the State of Ohio, and which is a citizen of the State of Ohio, and the defendant, Stroh Brewery Company, Inc., a corporation organized under the laws of the State of Arizona, which is a citizen of the State of Arizona, and having its principal place of business at 909 East Elizabeth Street, Detroit, Michigan. At all times herein referred to defendant has been doing business in the State of Ohio. The amount in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

2. Plaintiff is a wholly owned subsidiary of the Genesee Distributing Co., an Ohio corporation, hereinafter referred to as "GENESEE".

FIRST CAUSE OF ACTION

3. Since the year 1936 Genesee and defendant had been operating under an agreement wherein plaintiff was designated the exclusive distributor in Mahoning and Trumbull Counties, Ohio, of beer and other products manufactured by defendant. Said agreement was to be in full force and effect for an indefinite term. In January of 1956 Genesee and defendant agreed that Genesee would set up a separate sales division to distribute Stroh products exclusively. Defendant insisted that plaintiff cause the incorporation and formation of plaintiff as a separate company and agreed that upon its incorporation plaintiff would be substituted for Genesee as the exclusive Stroh distributor in Mahoning and Trumbull Counties, Ohio, with all the rights and obligations which had devolved upon Genesee as a Stroh distributor. In accordance with defendant's demands Genesee caused plaintiff to be formed and incorporated on January 4, 1958 and plaintiff thereupon was substituted for Genesee as the exclusive Stroh distributor for Mahoning and Trumbull Counties, Ohio.

4 Plaintiff fulfilled every requirement of its distributorship agreement with defendant and exerted its best efforts to sell and promote the sale of defendant's products. To that end plaintiff incurred considerable sales and advertising expenses.

5. In reliance on its distribution agreement with the defendant, plaintiff leased a warehouse building at 58 Hubbard Road, Youngstown, Ohio. Plaintiff purchased a cooler,

warehouse equipment and office equipment for this building, leased trucks and tractor-trailer, and obtained liquor permits from the Ohio Department of Liquor Control and from the United States Treasury Department.

6. Defendant was the only company for which plaintiff acted as a distributor. Defendant was plaintiff's sole source and supply of merchandise for distribution and sale.

7. Plaintiff sold Stroh products at an annual rate of between Seven Hundred Thousand Dollars ($700,000.) and Seven Hundred Fifty Thousand Dollars ($750,000.). The net profit before taxes and after all other costs and expenses ranged between three per cent (3%) and four per cent (4%) of gross sales.

8. On April 13, 1959, Sanford Y. Lipton, one of plaintiff's officers, heard rumors that defendant was planning to cancel plaintiff's distribution franchise. At that time, Sanford Y. Lipton was away from Youngstown, Ohio, on vacation. He thereupon called Morton R. Engel, defendant's Sales Representative for the State of Ohio, by long distance telephone to inquire into the truth of these rumors. Engel advised Lipton that the rumor was without basis, that plaintiff was still the Stroh distributor for Mahoning and Trumbull Counties, Ohio, and that its position as a distributor was secure. Subsequently, on April 17, 1959, Lipton met with Engel in Cleveland, Ohio. Engel, at that time, confirmed his earlier statement that plaintiff was still the Stroh distributor and had nothing to fear.

9. On April 20, 1959, without giving plaintiff any prior notice whatsoever, defendant cancelled plaintiff's distribution franchise to be effective immediately.

SECOND CAUSE OF ACTION

10. Plaintiff says that *for many months* prior to April 20, 1959, the defendant and The Kohn Beverage Co., an Ohio corporation with its principal place of business in Akron, Ohio, Pauline Kohn, a.k.a. Mrs. R. K. Yellig, an officer and stockholder of The Kohn Beverage Co., Adam J. Kohn, a.k.a. Charley Davis, an officer and stockholder of The Kohn Beverage Co., and Morton R. Engel, defendant's Ohio Sales Representative, *tortiously and maliciously conspired and confederated together to destroy plaintiff's business, good will and organization;* to appropriate it for themselves and to interfere with plaintiff's advantageous, cordial and harmonious relationsh p with its employees and customers.

11. To that end, defendant and its co-conspirators secretly agreed that defendant would cancel plaintiff's distribution franchise without giving notice to plaintiff, and would simultaneously issue a new franchise to a corporation to be formed by its co-conspirators.

12. Pursuant to this conspiracy, co-conspirators caused Kohn, Inc. to be incorporated on March 30, 1959. On information and belief, plaintiff says that Kohn, Inc. is an undercapitalized corporation; that it is a mere instrumentality of defendant's co-conspirators and subject to their complete will, control and direction, and that it was formed for the sole purpose of furthering the conspiracy as aforesaid.

13. On April 1, 1959, defendant's co-conspirators secured a year's lease for a suitable building in the Youngstown area for the Kohn, Inc. operation. This building is located at 3825 Belmont Avenue Extension, Liberty Township, Trumbull County, Ohio. Defendant's co-conspirators further obtained a fleet of trucks which were placed in readi-

ness to commence operations in the Youngstown area as soon as defendant cancelled plaintiff's franchise and issued a new franchise to Kohn, Inc.

14. In furtherance of this conspiracy, the defendant and its co-conspirators contacted plaintiff's warehouse manager, Stephen Zarich, a long trusted and key employee, and also contacted his brother, Peter Zarich, Genesee's route supervisor, a long trusted and key employee, for the purpose of inducing said Stephen Zarich and Peter Zarich to leave their employment and to join the staff of Kohn, Inc. as participants in the conspiracy aforesaid. Said Stephen Zarich and Peter Zarich were each given a one-third (1/3) interest in the profits of Kohn, Inc. as an inducement to enter into the conspiracy.

15. Stephen Zarich and Peter Zarich thereupon joined the conspiracy. At the request of defendant and its co-conspirators, said Stephen Zarich and Peter Zarich contacted each of plaintiff's truck drivers and salesmen to induce the said employees to leave plaintiff en masse; to become employed by Kohn, Inc.; and to take with them all plaintiff's documents, records and files containing secret and confidential information respecting customers, routes, sales and defendant's promotions. On April 20, 1959, immediately after defendant's cancellation of plaintiff's distribution franchise, said Stephen Zarich and Peter Zarich left their respective employments without any notice to their respective employers. All but three (3) of plaintiff's drivers and salesmen suddenly without notice to plaintiff quit its employ on that day and immediately began employment with Kohn, Inc.

16. On April 20, 1959, *defendant tortiously, maliciously and in furtherance of the conspiracy, cancelled plaintiff's franchise* for the distribution of Stroh products. Defendant

then promptly commenced selling Stroh merchandise to Kohn, Inc.

17. Defendant sold beer to Kohn, Inc. before Kohn, Inc. had even applied for a basic permit from the United States Treasury Department for the sale of alcoholic beverages.

18. Defendant, its co-conspirators and plaintiff's former drivers and salesmen immediately made contact with all of plaintiff's customers in an effort to interfere with and destroy plaintiff's well established, enviable relationships with these customers and to appropriate said customers for their own enterprise.

19. Plaintiff says that the defendant and its co-conspirators have completely destroyed plaintiff's business, organization and good will and are contacting plaintiff's employees and customers to entice them away from plaintiff. Plaintiff says that said conduct by the defendant and its co-conspirators is causing great and irreparable damage to plaintiff.

20. Plaintiff says that it has no adequate remedy at law; that unless defendant is restrained and enjoined from the willful and tortious destruction of plaintiff's business and from the willful interference with plaintiff's relations with its customers and employees, plaintiff will suffer great and irreparable damage.

21. WHEREFORE, plaintiff prays that:

A. Summons issue from this Honorable Court upon the defendant.

B. After notice a preliminary injunction be issued by this Honorable Court against the defendant restraining said defendant from participating directly or indirectly in the conspiracy to destroy plaintiff's business, good will and organization and interfering with plaintiff's

advantageous relationships with employees and customers by doing any of the following acts:

(1) Refusing to sell beer and other merchandise to plaintiff for sale and distribution in Mahoning and Trumbull Counties, Ohio.

(2) Selling beer and other merchandise to or otherwise doing business with Kohn, Inc. or any other person, persons or corporation for distribution in Mahoning and Trumbull Counties, Ohio.

(3) Contacting or employing any of plaintiff's present or former employees.

C. After trial a permanent injunction be issued by this Honorable Court against the defendant restraining said defendant from participating directly or indirectly in the conspiracy to destroy plaintiff's business, good will and organization and interfering with plaintiff's advantageous relationships with employees and customers by doing any of the following acts:

(1) Refusing to sell beer and other merchandise to plaintiff for sale and distribution in Mahoning and Trumbull Counties, Ohio.

(2) Selling beer and other merchandise to or otherwise doing business with Kohn, Inc. or any other person, persons or corporation for distribution in Mahoning and Trumbull Counties, Ohio.

(3) Contacting or employing any of plaintiff's present or former employees.

D. Plaintiff be awarded compensatory damages on its first and second causes of action in the amount of Two Hundred Fifty Thousand Dollars ($250,000.).

E. Plaintiff be awarded punitive damages on its second cause of action in the amount of Five Hundred Thousand Dollars ($500,000.).

F. By reason of defendant's wilfully tortious conduct, this Honorable Court award to plaintiff the costs and counsel fees incurred by it in this action; and

G. Plaintiff have such other and further relief which to this Honorable Court may seem just and equitable in the premises.

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By: MYRON N. KROTINGER.

STATE OF OHIO
MAHONING COUNTY } ss.

SANFORD Y. LIPTON, being first duly sworn, says that he is an officer of the Ace Beer Distributors, Inc., the plaintiff in the within entitled action; that he has read the complaint in this action; that the allegations therein set forth are true except such allegations as are made upon information and belief, and he believes them to be true.

SANFORD Y. LIPTON

SUBSCRIBED and SWORN To before me this 9th day of May, 1959.

ROBERT B. WEIMER
Notary Public
My Commission Expires September 13, 1961.

Office-Supreme Court, U.S.
FILED
OCT 28 1963
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

No. 444.

OCTOBER TERM, 1963.

ACE BEER DISTRIBUTORS, INC.,

Petitioner,

v.

KOHN, INC., THE KOHN BEVERAGE CO., PAULINE KOHN, ADAM J. KOHN, STEPHEN ZARICH AND PETER ZARICH,

Respondents.

ACE BEER DISTRIBUTORS, INC.,

Petitioner,

v.

THE STROH BREWERY COMPANY AND MORTON R. ENGEL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS KOHN, INC., THE KOHN BEVERAGE CO., PAULINE KOHN, ADAM J. KOHN, STEPHEN ZARICH AND PETER ZARICH IN OPPOSITION.

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Stephen Zarich and Peter Zarich.

TABLE OF CONTENTS.

Opinions Below and Jurisdiction 1

Statutes Involved 2

Question Presented 2

Statement of the Case 3

Argument 8

A. The Decision of the Court Below is Not in Conflict With Any Decisions of This Court 8

B. The Decision of the Court Below is Not in Conflict With Decisions of Other Courts of Appeal 14

C. The Commission of a Business Tort in Connection With a Refusal to Deal Does Not Entitle the Injured Party to Treble Damages Under the Sherman Act 16

Conclusion 24

TABLE OF AUTHORITIES.

Cases.

A. C. Becken Co. v. Gemex Corp., 272 F. 2d 1 (7th Cir., 1959), *cert. den.* 363 U. S. 962 (1960) 13

A. S. Rampell v. Hyster, 3 N. Y. 2d 369, 144 N. E. 2d 371 (1957) 8

Albert Pick-Barth Co., Inc. v. Mitchell Woodbury Corp., 41 F. 2d 148 (1st Cir., 1930), 57 F. 2d 96 (1st Cir., 1932) 14, 15

Apex Hosiery Company v. Leader, 310 U. S. 469 (1940) 10, 20, 21

Atlantic Heel Co. v. Allied Heel Co., 284 F. 2d 879 (1st Cir., 1960) 14

Bausch & Lomb Optical Co. v. Wahlgren, 1 F. Supp. 799 (N. D. Ill., 1932) 8

Binderup v. Pathe Exchange, 263 U. S. 291 (1923) 9

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 273 F. 2d 218 (3rd Cir., 1959), *rev'd* 365 U. S. 127 (1961) 21

Flintkote Company v. Lysfjord, 246 F. 2d 368 (9th Cir., 1957) 12

Hunt v. Crumboch, 325 U. S. 821 (1945) 23

International Tailoring Co. v. Lucas, 64 N. Y. S. 2d 879 (1946) 8

Klor's v. Broadway Hale Stores, 359 U. S. 207 (1959) 10

Loewe v. Lawlor, 208 U. S. 274 (1908) 9

Lorain Journal Co. v. United States, 342 U. S. 14 (1951) 11

Morgan's Home Equipment Corp. v. Martucci, 390 Pa. 618, 136 Atl. 2d 838 (1957) 8

Northern Pacific Ry. Co. v. United States, 356 U. S. 1 (1958) 11

Parmelee Transportation Co. v. Keeshin, 292 F. 2d 794 (7th Cir., 1961), *cert. den.* 368 U. S. 944 (1961), *rehearing den.* 368 U. S. 972 (1962) 22

Poller v. Columbia Broadcasting System, 368 U. S. 464 (1962) 11, 18

Radiant Burners, Inc. v. Peoples' Gas, Light & Coke Co., 364 U. S. 656 (1961) 10

Radovich v. National Football League, 352 U. S. 445 (1957) 11

Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899 (D. Md. 1956), *aff'd. on op. below* 239 F. 2d 176 (4th Cir., 1956), *cert. den.* 355 U. S. 823 (1957) 18

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 284 F. 2d 1 (9th Cir., 1960), *modified* 289 F. 2d 933 (9th Cir., 1961), *rev'd* 370 U. S. 19 (1962) 15

Syracuse Broadcasting Corp. v. Newhouse, 236 F. 2d 522 (2nd Cir., 1956) 15

Times-Picayune Publishing Co. v. United States, 345 U. S. 594 (1953) 12, 18

United States v. Parke, Davis & Co., 362 U. S. 29 (1960) 13

United States v. Socony Vacuum Oil Co., 310 U. S. 150 (1940) 13

United States v. Yellow Cab Co., 332 U. S. 218 (1947) 12

White Motor Company v. United States, 372 U. S. 253 (1963) 12

Article.

Oppenheim, *Selected Antitrust Developments*, 15 A. B. A. Section on Antitrust Law, 37 (1959) 16

Statutes.

Sherman Act:

Sec. 1 (15 U. S. C. § 1) 2, 3, 14, 16

Sec. 2 (15 U. S. C. § 2) 2

Clayton Act:

Sec. 1 (15 U. S. C. § 12) 17

Sec. 4 (15 U. S. C. § 15) 17

Automobile Dealer Franchise Act of 1956 (15 U. S. C. §§ 1221-1225) 17

Federal Trade Commission Act, Section 5 (15 U. S. C. § 45) 17

In the Supreme Court of the United States

No. 444.

OCTOBER TERM, 1963.

ACE BEER DISTRIBUTORS, INC.,

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Respondents.

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OPINIONS BELOW AND JURISDICTION.

The opinion of the Court of Appeals is reported at 318 F. 2d 283.

Petitioner, Ace Beer Distributors, Inc. (hereinafter referred to as "Ace"), previously applied for a prelimi-

nary injunction in this action and in a still pending companion action alleging common law torts against certain of the respondents in this action. The Court of Appeals affirmed without opinion denials of preliminary injunctions in both cases at 280 F. 2d 424.

Otherwise, the statement in the petition as to the opinions below and the jurisdictional requirements are correct.

STATUTES INVOLVED.

The statutes involved are those listed on page 3 of the petition. Petitioner has abandoned any claim under Section 2 of the Sherman Act and that section should not have been printed in Appendix B to the petition.

QUESTION PRESENTED.

Whether a complaint alleging a substitution by a brewer (Stroh) of a newly created distributor (Kohn) to replace Stroh's former distributor (Ace) whose sole business was the distribution of Stroh beer pursuant to an exclusive distributorship in two counties in Ohio, states a cause of action under Section 1 of the Sherman Act where there is no allegation that Ace and Kohn were in competition with each other or that there was any effect upon the competitive state of the market, but where it is alleged that common law torts were committed against Ace and that the acts done were as a result of a conspiracy between Stroh and Kohn.

STATEMENT OF THE CASE.

This is a treble damage action brought by petitioner against respondents solely for alleged violations of Section 1 of the Sherman Act, 15 U. S. C. § 1, which makes illegal every conspiracy "in restraint of trade or commerce among the several States."

The District Court for the Northern District of Ohio, Eastern Division, granted judgment on the pleadings to the respondents and this judgment was affirmed by the Court of Appeals for the Sixth Circuit.

There is no diversity of citizenship among the parties and the District Court would have no jurisdiction to hear a common law tort action against certain of the respondents. The question is not whether the petitioner might have a cause of action for tort in some other court against these respondents, but is solely whether the complaint states a claim under Section 1 of the Sherman Act.

In its Statement of the Case and throughout its petition filed in this Court petitioner repeatedly incorrectly asserts that the complaint alleges a conspiracy to destroy "a competitor" or to suppress "competition." In order to do this petitioner even misquotes its own complaint. At page 24 of the petition, petitioner represents to this Court that its complaint specifically alleges a conspiracy "to suppress competition."

The complaint does not contain the conclusory allegation which petitioner purported to quote from it. Instead of reading "to suppress competition," the complaint actually reads "to suppress *prospective* competition" (Complaint, Par. 15; Tr. 8a). The circumstances under which a suppression of existing competition may constitute a Sherman Act violation are quite different from those which must appear when, as here, the complaint alleges only

the suppression of the prospective competition of an individual non-competitor.

Petitioner, upon this misquotation of its complaint, then continues on page 24 of its petition by complaining of the Court of Appeals' ruling that the effects alleged in the complaint did not "eliminate or materially diminish the existing competition of the distributors of other beers."

If the complaint had read the way petitioner now incorrectly quotes it, this criticism of the Court of Appeals might deserve consideration. But the complaint, in fact, does not allege either the existence of any competition between the parties, or the suppression of any competition, or any effect upon competition in the market, and the portion of the opinion of the Court of Appeals quoted by petitioner necessarily follows from the facts which were actually alleged, and which show that there was no effect on competition in commerce.

The complaint alleges that the petitioner's parent corporation was formerly the distributor in Mahoning and Trumbull Counties, Ohio (the Youngstown area), of Stroh Beer under an agreement with the respondent, Stroh Brewery Company (Stroh) (Complaint, Par. 8; Tr. 6a, 7a). Petitioner's parent corporation in 1958 created petitioner, Ace Beer Distributors, Inc. (Ace), as a separate company to be the exclusive Stroh distributor in those counties, and Ace acquired from its parent corporation the parent's rights under the distributorship agreement (Complaint, Par. 8; Tr. 7a). Stroh was the only company for which Ace acted as a distributor. Stroh was Ace's sole source and supply of merchandise for distribution and sale (Complaint, Par. 11; Tr. 7a).

Stroh thereafter cancelled its distributorship agreement with Act; as Ace concedes in its petition that Stroh had a right to do (Petition, pages 11, 12). Stroh substi-

tuted as its distributor in Mahoning and Trumbull Counties the respondent, Kohn, Inc. (Kohn), a company which was newly organized for that purpose by the respondents, Adam J. Kohn, Pauline Kohn and Kohn Beverage Co. (Complaint, Par. 14(b); Tr. 8a).

The respondent, Stephen Zarich, a "key employee" of Ace (Complaint, Par. 14d; Tr. 9a) left Ace's employ and became employed by Kohn (Complaint, Par. 14e; Tr. 10a). His brother, the respondent Peter Zarich, had been employed as a route supervisor by Ace's parent corporation which is not a party to this action (Complaint, Par. 14d; Tr. 9a). Peter Zarich left the employ of that company and also became employed by Kohn. All but two of Ace's drivers and salesmen also left Ace and were employed by Kohn (Complaint, Par. 14e; Tr. 10a). In the then existing state of the Youngstown labor market it was not possible to hire other employees with comparable training and experience (Complaint, Par. 14e; Tr. 10a).

The complaint also asserts that sometime after Stephen Zarich had left Ace's employ he returned and took certain records from Ace's office (Complaint, Par. 16; Tr. 10a).

The complaint alleges that these acts were done pursuant to an agreement or conspiracy among the respondents. From these ultimate facts, pleaded in great detail, Ace concludes that the alleged conspiracy was "to eliminate plaintiff as a beer distributor in interstate commerce and thereby to suppress prospective competition in commerce with the said Kohn, Inc. in the sale of Stroh's beer" (Complaint, Par. 13; Tr. 8a).

The complaint does not allege that Kohn and Ace ever competed in the market and, on the contrary, shows that Ace was created by its parent solely to distribute Stroh products and that it was the exclusive distributor of Stroh

products until the cancellation of its distributorship agreement and the substitution of Kohn, newly created for that purpose, as distributor. The alleged conspiracy could have no effect on competition existing in the Youngstown beer market, and no such effect is alleged.

There is no allegation that the alleged conspiracy had as its purpose or result any monopolization or price fixing or other market control. Similarly, there is no allegation of any group boycott or any use of market power. In short, the complaint alleges nothing but the substitution of one distributor for another, with no effects upon competition in the market, but accompanied by allegedly tortious acts against the former distributor.

In granting the respondents' motion for judgment on the pleadings, the District Court specifically held that "under the pleadings there can be *no conspiracy in restraint of trade* within the meaning of the Act." He further said that he could find in the events narrated in the complaint no "lessening of competition" and no "restraint of trade" (Memorandum Opinion, Tr. 32a, 33a).

In affirming, the Court of Appeals also concluded that the allegations of the complaint did not constitute any "restraint of trade" within the meaning of the Sherman Act. That court stated in part:

> "The fact that a refusal to deal with a particular buyer without more, may have an adverse effect upon the buyer's business does not make the refusal to deal a violation of the Sherman Act. Damage alone does not constitute liability under the Act.
>
> "The present case does not involve price fixing. Nor does it involve an attempt to create a monopoly. The Stroh Brewery Company had one distributor in the territory under consideration before it terminated the plaintiff's franchise. It continued to have only one distributor thereafter. There is no allegation or con-

tention that the beer of other breweries was not just as available in that area after the change in distributors as it was before. See: *United States v. E. I. du Pont de Nemours & Co.*, 351 U. S. 377.

*"Unless it can be said that the refusal to deal with plaintiff had the result of suppressing competition and thus constituted 'restraint of trade' within the meaning of Section 1 of the Sherman Act, there is no violation of the Act. We do not think that the substitution by Stroh Brewery Company of one distributor for another had this result.**

"It is well settled that the 'restraint of trade' referred to in Section 1 of the Act, means only unreasonable restraint of trade, in that, as the cases point out, every commercial contract has some restraining effect upon trade. *Standard Oil Co. v. United States*, 221 U. S. 1, 51; *United States v. American Tobacco Co.*, 221 U. S. 106, 179-180; *Chicago Board of Trade v. United States*, 246 U. S. 231, 238-239. The substitution of one distributor for another in a competitive market of the kind herein involved does not eliminate or materially diminish the existing competition of distributors of other beers, is not an unusual business procedure, and, in our opinion, is not an unreasonable restraint of trade." (Petition, pp. 32, 33.)

The petitioner has attempted to create an issue which has nothing to do with this case by asserting in its Statement of the Case and Argument that "public injury" was somehow involved in the decision below. At page 14 of its petition petitioner claims that the Court of Appeals insisted "upon allegations and proof of 'public injury' as a prerequisite to a finding that Stroh's wrongfully exercised its right of cancellation." Despite the quotation marks which petitioner placed around the words "public injury," those words are petitioner's and not the Court of

* Emphasis supplied throughout.

Appeals'. The Court of Appeals did not in any way base its decision upon "public injury," nor did it even mention that subject. Its decision was based upon the quite different ground that the allegations of the complaint did not set forth *any* restraint of trade or *any* unreasonable restraint of trade within the meaning of the Sherman Act. And contrary to petitioner's assertion (Petition, page 6, lines 2-7) a requirement that a restraint be unreasonable is not the same thing at all as a requirement of "public injury." Petitioner is mistaken if by this it is suggesting that this Court has *sub silentio* abolished the "rule of reason."

ARGUMENT.

A. The Decision of the Court Below Is Not in Conflict With Any Decisions of This Court.

The only cases cited by petitioner alleging facts comparable to those alleged in petitioner's complaint are common law tort cases where only simple damages or injunctive relief were sought. *Morgan's Home Equipment Corp. v. Martucci*, 390 Pa. 618, 136 Atl. 2d 838 (1957); *Bausch & Lomb Optical Co. v. Wahlgren*, 1 F. Supp. 799 (N. D. Ill., 1932); *International Tailoring Co. v. Lucas*, 64 N. Y. S. 2d 879 (1946); *A. S. Rampell v. Hyster*, 3 N. Y. 2d 369, 144 N. E. 2d 371 (1957).

The Sherman Act decisions upon which petitioner relies all differ from the present case in that in each of them there was alleged either the unlawful use of market power, or there was alleged a conspiracy to achieve one of those market effects, such as a change in the competitive state of the market, the acquisition of monopolistic power, or control of prices, quantities or territories, which constitute an unreasonable restraint of the trade in the marketing of goods within the meaning of the Sherman Act. Such addi-

tional factors are what make the difference between an ordinary common law tort case and a Sherman Act case.

No such additional factor is alleged in the present case, and petitioner's complaint does not state a cause of action for anything more than simple tort. The decision of the court below that petitioner had not stated a claim under the Sherman Act did not involve the application of any new or novel principles of law, and is not in conflict with any decisions of this Court or of the Courts of Appeals for other circuits.

Typical of the cases alleging an improper use of market power are the group boycott cases. Such boycotts have consistently been held to be unlawful under the Sherman Act. Since no group boycott is alleged in the present case, those decisions have no application here.

Binderup v. Pathe Exchange, 263 U. S. 291 (1923), alleged a group boycott of a motion picture exhibitor by distributors who controlled the distribution of all films in the United States. That this was the basis for the decision in *Binderup* was made clear by the two sentences from that decision immediately following the sentence from which petitioner has quoted on page 12 of the petition. In those sentences this Court stated:

> "It is doubtless true that each of the distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act; but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all, to prevent any of them from dealing with the exhibitor."

Loewe v. Lawlor, 208 U. S. 274 (1908), involved a similar group action. Mr. Justice Stone, speaking for the

Court in *Apex Hosiery Company v. Leader*, 310 U. S. 469 (1940), described the allegations of the *Loewe* case as follows:

> "The restraint alleged was not a strike or refusal to work in the complainants' plant, but a secondary boycott by which, through threats to the manufacturer's wholesale customers and their customers, the Union sought to compel or induce them not to deal in the product of the complainants, and to purchase the competing products of other unionized manufacturers. This Court pointed out that the restraint was precisely like that in Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U. S. 600, 610, 614, 58 L. ed. 1490, 1498, 1500, 34 S. Ct. 951, LRA 1915A 788, in which a conspiracy to circulate a 'black list,' intended to persuade retailers not to deal with specified wholesalers, was held to violate the Act because of its restraint upon competition with unlisted wholesalers." (310 U. S. at 505.)

Another group boycott was the basis for the decision in *Klor's v. Broadway Hale Stores*, 359 U. S. 207 (1959). Again, in *Radiant Burners, Inc. v. Peoples' Gas, Light & Coke Co.*, 364 U. S. 656 (1961), the allegations were of a group boycott by gas suppliers as well as a horizontal conspiracy by a group of stove manufacturers to regulate the Chicago stove market so as to prevent Radiant Burners from selling its stoves in that market.

In each of the group boycott cases the alleged restraint not only involved the improper use of market power but also had a restraining effect upon the competitive state of the market. Indeed, "this Court has never applied the Sherman Act in any case * * * unless the Court was of opinion that there was some form of restraint upon commercial competition in the marketing of goods or services." *Apex Hosiery Company v. Leader*, 310 U. S. 469, 495

(1940). The substitution of Kohn for Ace did not place any restraint upon commercial competition in the marketing of beer in the Youngstown area.

In all of the other Sherman Act cases cited by Ace such an effect upon the market was alleged. For instance, in *Poller v. Columbia Broadcasting System*, 368 U. S. 464 (1962), there was alleged a conspiracy which had as its objectives both monopolization of the UHF television market in Milwaukee and the destruction of the UHF telecasting industry throughout the nation. A majority of the members of this Court were of the opinion that there existed a genuine issue of fact as to the truth of such allegations. By contrast, Ace has not alleged in the present petition any intention of monopolizing or of reducing the number of beer distributing businesses in Youngstown, or any intention to destroy the beer distributing business either in Youngstown or throughout the nation.

In several of the cases cited by petitioner the purpose of the alleged conspiracy was to monopolize a market, e.g., *Radovich v. National Football League*, 352 U. S. 445 (1957), where the defendants were alleged to have conspired "to monopolize and control organized professional football in the United States," *id.* at 447; and *Lorain Journal Co. v. United States*, 342 U. S. 143 (1951), in which this Court found that the defendant's conduct constituted an attempt to monopolize a segment of interstate commerce.

Other types of attempts to control a market and to restrain commercial competition in the marketing of goods have been struck down in other decisions cited by petitioner. In *Northern Pacific Ry. Co. v. United States*, 356 U. S. 1 (1958), this Court held unlawful contractual "preferential routing clauses" which were actually tying arrangements, where they were coupled with "sufficient

economic power to impose an appreciable restraint on free competition in the tied product," *id.* at 11.

Times-Picayune Publishing Co. v. United States, 345 U. S. 594 (1953), was, in part, an attempt to assert the existence of an unlawful tying agreement, which this Court found not to exist because there was no "dominant 'tying' product resulting in economic harm to competition in the 'tied' market," *id.* at 614 and, in part, an unsuccessful attempt to prove that the defendant had used a monopoly power to destroy its competition or to build another monopoly. Unlike *Times-Picayune*, Ace's petition in the present case does not allege either the use of monopoly power or any intent to change the competitive state of the market.

In *United States v. Yellow Cab Co.*, 332 U. S. 218 (1947), there were alleged two conspiracies, one conspiracy being by nearly all the Chicago taxicab companies to bring such companies "under common control and to eliminate competition among them relative to contracts for supply transportation" between railroad stations, *id.* at 229, and the other conspiracy being by a cab manufacturer and a number of cab operators to exclude all other cab manufacturers from the market represented by the defendant cab operating companies. Cf. *Flintkote Company v. Lysfjord*, 246 F. 2d 368 (9th Cir., 1957), in which Flintkote was alleged to have joined in a horizontal conspiracy among tile contractors by which they had agreed to refrain from competition, to maintain noncompetitive prices, to allocate sales and to use group boycotts in order to exclude competitors.

White Motor Company v. United States, 372 U. S. 253 (1963), involved a different type of restraint upon competition in the market, a vertical arrangement by a manu-

facturer restricting the territory and customers of his distributors and dealers. A trial was ordered to determine the actual impact of these arrangements on competition. Ace's petition alleges nothing remotely similar to the contractual agreements by the White Motor Company's dealers and distributors not to compete.

Price fixing, by its very nature, is necessarily destructive of a free competitive market. Accordingly, price fixing, both vertical (*United States v. Parke, Davis & Co.*, 362 U. S. 29 (1960); *A. C. Becken Co. v. Gemex Corp.*, 272 F. 2d 1 (7th Cir. 1959), *cert. den.* 363 U. S. 962 (1960)) and horizontal (*United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940)) has consistently been held to be in violation of the Sherman Act. No price fixing or price effect is alleged by Ace, and those cases, although relied upon by Act in its petition, have no relevance here.

In all of the above cases, *which include all of the Sherman Act cases decided by this Court cited by petitioner*, there was alleged an intent to affect the competitive state of the market, either by a direct lessening of competition in the market, or by the acquisition of improper market power and the creation of restrictive market conditions.

Such of those cases as dealt with conspiracies to decrease competition existing within a market are not relevant because the substitution of the newly created Kohn Company to replace Ace, a company with which it never competed, could have no effect upon competition existing in the market. And each of the other cases, which dealt with conspiracies to acquire improper market power and to create restrictive market conditions, are not relevant, because Ace has not alleged that there was any change in market conditions or any acquisition of monopoly or other improper power.

It seems to be petitioner's position that a Sherman Act violation is stated any time that there is alleged "destruction of the trader's business capability by conspiracy." (Petition, p. 11.) In other words, petitioner would expand the coverage of Section 1 of the Sherman Act to include common law torts against business entities, even in the absence of any effect upon competition in the market or any other effect upon market conditions. No court has ever interpreted the Sherman Act as meaning what petitioner now says it means.

B. The Decision of the Court Below Is Not in Conflict With Decisions of Other Courts of Appeals.

The decisions of the Court of Appeals for the 1st, 2nd and 9th Circuits upon which petitioner relies in pages 19-24 of its petition are entirely consistent with the decision of the court below in the instant case. In each of those cases there was alleged to exist a conspiracy designed to lessen the competition existing in the market.

In *Albert Pick-Barth Co., Inc. v. Mitchell Woodbury Corp.*, 41 F. 2d 148 (1st Cir., 1930), 57 F. 2d 96 (1st Cir., 1932) the defendant was plaintiff's largest competitor, and a conspiracy was shown, "the intent and purpose of which, if carried out, would eliminate the largest competitor of one of the conspirators in a particular section of the country * * *" 57 F. 2d at 102.

Similarly, in *Atlantic Heel Co. v. Allied Heel Co.*, 284 F. 2d 879 (1st Cir., 1960) the parties were actual competitors within a market and the purpose of the alleged conspiracy was to lessen competition within the market by preventing plaintiff from continuing to compete. The court held that a cause of action was stated. Judge Hartigan, who wrote the opinion, indicated that he was following

Albert Pick-Barth, but a majority of the court in a concurring opinion by Judge Woodbury, refused to endorse *Albert Pick-Barth*, stating that that case "was unique on its facts in 1932 and so far as we can determine it stands alone today."

Syracuse Broadcasting Corp. v. Newhouse, 236 F. 2d 522 (2nd Cir., 1956) involved a radio station and a newspaper in Syracuse which were alleged to be in competition for the advertising business in the market. The plaintiff claimed that the defendants had conspired "for the alleged purpose of putting plaintiff out of business and removing it from the scene as a competitor" 236 F. 2d at 526.

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 284 F. 2d 1 (9th Cir., 1960), *modified* 289 F. 2d 933 (9th Cir., 1961), *reversed*, 370 U. S. 19 (1962) dealt with allegations of attempted monopolization and of a conspiracy among three of plaintiff's competitors and a supplier intended to change the competitive state of the market by eliminating the competition of the plaintiff. Indeed, in the portion of the charge to the jury quoted by the petitioner, the court requiring a finding of liability only in the event that the jury found that the conspiracy was "to eliminate the competition of the plaintiff." (Petition, p. 23.)

But the conspiracy set forth in Ace's complaint is not alleged to have lessened competition existing in the market, nor to have had any effect upon the competitive state of the market. It involved nothing but the substitution of a newly created Stroh distributor for the former Stroh distributor in an otherwise unaffected market.

C. The Commission of a Business Tort in Conection With a Refusal to Deal Does Not Entitle the Injured Party to Treble Damages Under the Sherman Act.

The basic theory upon which petitioner relies in asserting that its complaint sets forth a Sherman Act violation appears on pages 16-18 of its petition where petitioner claims that a change in distributors, when associated with "tortious conduct constituting unfair competition or unfair trade practices at common law" (Petition, p. 18) is a violation of Section 1 of the Sherman Act even where there is no effect upon competition in the market. There is no support for this argument by petitioner, and the courts below properly rejected it.

This novel theory is apparently based upon a misunderstanding of an article by Professor Oppenheim in *Selected Antitrust Developments*, 15 A. B. A. Section on Antitrust Law, 37 (1959). At page 43 Professor Oppenheim set forth what he called "the basic principle that a seller, acting unilaterally, has the discretion to select the persons with whom he will deal or continue to deal." The Professor then explained the limitations which exist with respect to this discretion and set forth the circumstances under which the would-be purchaser will be provided a remedy by some law, *but not necessarily by the Sherman and Clayton Acts*. He was listing *all* of the remedies, under *all* laws, which may be available under various circumstances. He said:

> "The over-all limitation is misuse or abuse of this discretion when there is proof of any one of a number of plus elements of liability that may taint the otherwise lawful individual refusal to deal.
>
> "These plus elements include among others, the following major species of illegality: (1) tortious conduct constituting unfair competition or unfair trade

> practices at common law; (2) violation of a civil rights statute or other type of constitutionally valid statute limiting refusals to deal; and (3) conduct otherwise in violation of the Sherman Act, the Clayton Act, Section 5 of the Federal Trade Commission Act or any applicable state antitrust statute." (pp. 43-44.)

By this, Professor Oppenheim meant only that *some* legal remedy exists whenever the "plus elements" are found. He did not mean that there is a remedy in each case under the Sherman and Clayton Acts.

For instance, as an example of his second category, violation of a statute limiting refusal to deal, he listed in footnote 28 the Automobile Dealer Franchise Act of 1956, 15 U. S. C. § 1221-1225. But a refusal to deal in violation of that act does not create a cause of action for treble damages under the Sherman and Clayton Acts. Instead, the Franchise Act provides (15 U. S. C. § 1222) for actual damages only.

In his third category of "plus elements" Professor Oppenheim includes violations of "Section 5 of the Federal Trade Commission Act or any applicable state antitrust statute." But a violation of § 5 of the Federal Trade Commission Act (15 U. S. C. § 45) is *not* a violation of the antitrust acts as defined by Congress (15 U. S. C. § 12) and does not entitle the injured party to a treble damage action under the Clayton Act (15 U. S. C. § 15). And it is hardly necessary to point out that a violation of a state antitrust statute is not automatically a violation of the Sherman Act.

Similarly, when there is present Professor Oppenheim's first "plus element," "tortious conduct constituting unfair competition or unfair trade practices at common law" an injured party's only remedy is for ordinary damages at common law unless there is *in addition* a separate

and further intent or natural consequence of causing one of those market effects which constitute an unreasonable restraint of trade under the Sherman Act. And Ace's complaint shows that no such intent or consequence was present here.

Petitioner also argues that *Times-Picayune Publishing Co. v. United States*, 345 U. S. 594 (1953) and *Poller v. Columbia Broadcasting System*, 368 U. S. 464 (1962) stand for the proposition that an individual refusal to deal is a Sherman Act violation if accompanied by *any* "unlawful conduct or agreement." But, quite plainly, the "unlawful conduct or agreement" which this Court referred to in those cases was conduct or agreement which would itself be unlawful *under the Sherman Act*. That this was the meaning of the Court was made plain by Mr. Justice Clark in *Poller* when he stated that CBS's argument erroneously assumed that CBS had an absolute right "*despite violations of the antitrust laws*" to exercise its contractual privilege, 368 U. S. at 473. And, as Mr. Justice Harlan pointed out in his dissent, the Court's opinion recognized that CBS's purchase of a TV station in Milwaukee and cancellation of Poller's station affiliation "would be unlawful only if conceived in a purpose to unreasonably restrain trade, control a market, or monopolize." 368 U. S. at 478. In the instant case, where there is not alleged to have been any such purpose or agreement, the mere addition of allegedly tortious conduct to a refusal to deal does not create a Sherman Act violation.

In *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md. 1956), *aff'd. on op. below*, 239 F. 2d 176 (4th Cir. 1956), *cert. den.* 355 U. S. 823 (1957), an automobile dealer brought an action against its former supplier (Hudson) and another dealer (Bankert) alleging a refusal to deal, coupled with "facts which would

support claims against Hudson for breach of contract and which might support claims against Bankert for tortious interference with contract rights." 138 F. Supp. at 902. In holding that this complaint did not state a cause of action under the Sherman Act, the Court said in part:

> "The general principles which control these cases have been frequently stated, and may be briefly summarized. Every manufacturer has a natural and complete monopoly of his particular product, especially when sold under his own private brand or trade name. * * * If he is engaged in a private business, he is free to exploit this monopoly by selling his product directly to the ultimate consumer or through one or more distributors or dealers, as he many deem most profitable to him. If he chooses the latter method, he may exercise his own independent discretion as to the parties with whom he will deal. This is a common law right which the antitrust laws have not destroyed. * * * *A refusal to deal becomes illegal only when it produces an unreasonable restraint of trade or a monopoly forbidden by the anti-trust laws.* * * *
>
> * * *
>
> "No horizontal conspiracy between competitors, no effort to extend the manufacturer's natural monopoly of its own product, no effort to establish market dominance and drive out the products of competitors is alleged.
>
> * * *
>
> "Of course the agreement would be invalid if it was the result of some horizontal arrangement between competitors, or if there was any agreement which tended unreasonably to restrain interstate commerce or to create a monopoly. But a monopoly in that sense would have to be a real monopoly in the commodity and not the natural monopoly which a manufacturer has in his own product. Unless the manufacturer dominates the market, he has a right to

give a dealer an actual monopoly, let alone a 'virtual' monopoly, in the sale of his particular make or brand in a particular territory.

"And this right is not to be lost simply because the manufacturer and the dealers discuss the matter before the expiring agency or dealership agreements terminate and are not renewed." (138 F. Supp. at 905-907.).

In *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1940) this Court established the principle that the standard for determining the legality of conduct under the antitrust laws must be found in those laws and not elsewhere. There it was contended that the defendants had violated the Sherman Act by conspiring to stop the operation of the plaintiff's factory by a sit-down strike and that they had carried out the conspiracy by means of a series of tortious, and at times violent, actions. This Court, recognizing that the conspiracy was intended to restrain the movement of goods in interstate commerce and that various torts had been committed against plaintiff's business, held that nevertheless this was not the kind of restraint of commerce which the Sherman Act was designed to prohibit.

"But the Sherman Act admittedly does not condemn all combinations and conspiracies which interrupt interstate transportation. * * * It is not seriously contended here that a conspiracy to derail and rob an interstate train, even though it were laden with 100,000 dozen pairs of stockings, necessarily would involve a violation of the Sherman Act." (310 U. S. at 486-487.)

* * *

"* * * The legislative history of the Sherman Act, as well as the decisions of this Court interpreting it, show that it was not aimed at policing interstate transportation or movement of goods and property. * * * It was another and quite a different evil at

which the Sherman Act was aimed. It was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury." (310 U. S. at 490-493.)

* * *

"* * * The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce. It draws no distinction between the restraints effected by violence and those achieved by peaceful but oftentimes quite as effective means. Restraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence." (310 U. S. at 513.)

The *Apex* case was cited with approval by Mr. Justice Black in his opinion in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961). The Court of Appeals in the *Noerr* case had affirmed a judgment that group solicitation by certain railroads of legislation and law enforcement injurious to their competitors in the trucking industry violated the Sherman Act. 273 F. 2d 218 (3rd Cir., 1959). The Third Circuit's affirmance was based upon the fact that the record showed "both legal and illegal methods to obtain the illegal objective of injuring and/or destroying the long-haul trucking industry." (273 F. 2d 220.)

This Court reversed. It held that the Sherman Act did not apply. The Court said that although the defendants' conduct—

> "could perhaps, through a process of expansive construction, be brought within the general proscription of 'combination(s) * * * in restraint of trade,' they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements." (365 U. S. at 136.)

The same principles were applied in *Parmelee Transportation Co. v. Keeshin*, 292 F. 2d 794 (7th Cir., 1961), *cert. den.*, 368 U. S. 944 (1961), *rehearing den.* 368 U. S. 972 (1962). In that case the defendant railroads were alleged to have conspired among themselves and with Mr. Cross, an Interstate Commerce Commissioner, to destroy the plaintiff's business of transferring passengers and baggage among the various Chicago railroad stations. The purpose of the alleged conspiracy was to give the transfer business to a new company with which Mr. Cross was associated. That new company was to be substituted for Parmelee as the recipient of the railroads' transfer business. The alleged conspiracy included tortious and criminally illegal activities, in that the railroads' substitution of the new company to handle the transfer work was made in order to influence Commissioner Cross to give favorable consideration to important railroad matters pending before the Interstate Commerce Commission. The District Court held that these actions, although wrong under

other law, were not a violation of the Sherman Act, and the 7th Circuit affirmed, stating:

> "Assuming the record presented as to his (Cross') involvement reflects the truth (which we are for this purpose required to do), any party damaged thereby has (and would have had, even before the enactment of the Sherman Act) a ground for relief in the courts of this country. However, the use of conventional antitrust language in drafting a complaint will not extend the reach of the Sherman Act to wrongs not germane to that act, even though such wrongs be actionable under state law. We are not concerned with labels. Otherwise, an adroit antitrust lawyer might use his skill in the use of words to convert many unlawful acts into antitrust violations. The antitrust laws were never meant to be a panacea for all wrongs." (292 F. 2d at 804.)

As this Court stated of the Sherman Act in *Hunt v. Crumboch*, 325 U. S. 821 (1945):

> "That Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." (325 U. S. at 826.)

The allegations made by Ace constitute, at most, a charge that a tort was committed. The Sherman Act was not designed to supersede the law of torts and to authorize any business to invoke Federal jurisdiction and seek Clayton Act remedies whenever it suffers a tort, unless the acts were done in order to bring about market effects constituting unreasonable restraint of trade in interstate commerce within the meaning of the Sherman Act. No such unreasonable restraint of trade is alleged here. The courts below properly held that the petition did not state a claim under the Sherman Act.

CONCLUSION.

The decision below is not in conflict with any decisions of this Court or of other Courts of Appeal. The case was decided in conformity with long established doctrines. There are no special or important reasons for review by this Court. We respectfully ask that the petition be denied.

Respectfully submitted,

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In the Supreme Court of the United States

No. 444.

OCTOBER TERM, 1963.

ACE BEER DISTRIBUTORS, INC.,

Petitioner,

vs.

KOHN, INC., THE KOHN BREWERY CO., PAULINE KOHN, ADAM J. KOHN, STEPHEN ZARICH and PETER ZARICH,

Respondents.

ACE BEER DISTRIBUTORS, INC.,

Petitioner,

vs.

THE STROH BREWERY COMPANY and MORTON R. ENGEL,

Respondents.

REPLY BRIEF OF PETITIONER.

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TABLE OF CONTENTS.

I. The Exercise by the Court of its Power of Supervision Is Required to Correct the Restrictive Reading of the Allegations of the Complaint by Which Petitioner Has Been Excluded from Proving That it Was Both an Actual Competitor and a Prospective Competitor of Respondents in Commerce, and the Effect on Commerce of the Conspiracy Alleged 2

II. By the Denial of Petitioner's Status As a Competitor in Commerce, the Courts Below, in Conflict with the Rulings of Other Circuits, Seek to Deprive Petitioner of the Protection Afforded by the Anti-Trust Laws from Conspiracies and Combinations Designed to Protect the Right of a Competitor to Engage in Commerce 7

III. The Common Law Conspiracy to Destroy Petitioner's Business Serves to Underscore, Not to Condone, the Antitrust Violation 11

Conclusion 13

TABLE OF AUTHORITIES.

Cases.

A. P. Management Corp. v. Young & Rubicam, Inc., 1962 Trade Cases, Par. 70,254 (S. D. N. Y., 1962) 11-12

Delaware Valley Mar. Sup. Co. v. American Tobacco Co., 184 F. Supp. 440 (E. D. Pa., 1960) 8

Dorberg vs. Dow Chemical Company, 195 F. Supp. 337 (E. D. Penna. 1963) 9

Gamco, Inc. vs. Providence Fruit and Building, Inc., 194 F. 2d. 494 (C. A. 1, 1962) 7

Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U. S. 207 (1959) 1, 4, 8, 10, 11, 12

North Texas Producers Association v. Young, 308 F. 2d 235 (C. A. 5, 1962) *cert. den.*, 83 Sup. Ct. 874 (1963) 12

Poller, 368 U. S. 464 (1962) 1, 10, 11, 13

Radiant Burners, Inc. vs. Peoples Gas Light & Coke Co., 364 U. S. 656 10

Roemhild vs. Jones, 239 F. 2d 492 (8th Cir., 1957) 5

Schine Chains Theaters, Inc. vs. U. S., 334 U. S. 110 (1948) 4

Triangle Conduit & Cable Co., Inc. vs. National Electric Products Corporation, 152 F. 2d 398 (C. A. 3, 1945) 7

U. S. vs. Crescent Amusement Co. 323 U. S. 173 (1944) 3-4

U. S. vs. Griffith, 334 U. S. 100 (1948) 4

Vines vs. General Outdoor Advertising Co., 171 F. 2d 487 (C. A. 2, 1948) 7

Walker Distributing Co. vs. Lucky Lager Brewing Co., 1963 Trade Cases, Par. 70,886 6

White Motor, 372 U. S. 253 (1963) 1

Texts.

Barron and Holtzoff, Federal Practice and Procedure, Vol. 1, section 359, page 673 5

5 *Cyc. Federal Proc.*, § 15.225 5

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vs.

THE STROH BREWERY COMPANY and MORTON R. ENGEL,

Respondents.

REPLY BRIEF OF PETITIONER.

This Reply Brief is filed in reply to the two Briefs in Opposition filed by the respective Respondents herein.

Respondents attempt to defend the summary rulings by the courts below on motions for judgment on the pleadings. Since these rulings conflict with the substantive holdings of *Klor's, Inc.*, 359 U. S. 207 (1959) and *Poller*, 368 U. S. 464 (1962) and with the procedural holdings of *Poller* and *White Motor*, 372 U. S. 253 (1963), Respondents find themselves driven to untenable premises.

1. Upon motions for judgment on the pleadings, Respondents are forced to deny and read restrictively the allegations of the Complaint in order to argue that Petitioner was not, as alleged, a "competitor", entitled to the protection of the anti-trust laws. Respondents prefer to read the Complaint as alleging "business death by natural causes" rather than, as alleged, "business death by conspiracy to eliminate a competitor".

2. Having "denied" Petitioner the status of a competitor in commerce, Respondents then make further denial of the allegations of the Complaint by arguing that the anti-trust laws are inapplicable to a "mere shift" of a distributorship in a single product in a given market.

Respondents merely reflect the course of decision in the courts below. The rulings of these courts also necessarily proceeded from the denial of the allegations of the Complaint.

I.

THE EXERCISE BY THE COURT OF ITS POWER OF SUPERVISION IS REQUIRED TO CORRECT THE RESTRICTIVE READING OF THE ALLEGATIONS OF THE COMPLAINT BY WHICH PETITIONER HAS BEEN EXCLUDED FROM PROVING THAT IT WAS BOTH AN ACTUAL COMPETITOR AND A PROSPECTIVE COMPETITOR OF RESPONDENTS IN COMMERCE, AND THE EFFECT ON COMMERCE OF THE CONSPIRACY ALLEGED.

The Brief of Respondents, The Stroh Brewery Company and Morton R. Engel ("Stroh Brief"), and the Brief of the Respondents Kohn, Inc., et al. ("Kohn Brief"), both take considerable pains to "fraction off" the propositions of which ample notice is given by the Complaint.

Paragraph 13 of the Complaint (R. 8a) alleges that the purpose of Respondents' conspiracy was "*to eliminate*

plaintiff as a beer distributor in interstate commerce and thereby to suppress prospective competition in commerce with the said Kohn, Inc. in the sale of Stroh's beer." Paragraph 17 of the Complaint states: (R. 10a)

"Plaintiff says that the defendants have substantially destroyed plaintiff's business, organization and good will and have substantially destroyed plaintiff as a beer distributor in interstate commerce * * *"

From the allegations of its Complaint, and within the fair scope and intendment thereof, Petitioner is prepared to prove, that:

1. Petitioner intended to distribute and had the prospect of distributing beer in interstate commerce.
2. Petitioner and the new distributor, Kohn, Inc., were competitors in the distribution of Stroh's beer.
3. Petitioner intended to compete with Kohn, Inc., the new Stroh distributor, in the distribution of other beers.
4. Petitioner's business was not limited to the exclusive distributorship of a single product, but had the capability of distributing other malt beverages in commerce.
5. Respondents' conspiracy destroyed Petitioner's competitive capacity, *to the advantage of Stroh's, and to the disadvantage of the free flow of other products in commerce, in that Stroh's destruction of Petitioner foreclosed competing breweries from utilizing Petitioner's facilities in the distribution of such other beers.*
6. The impeding of commerce and the elimination of competition was the objective sought by Stroh.

This Court has repeatedly held that the diversion by conspiracy of the free flow of commerce to local marketing areas is a wrongful interference with commerce. U. S. vs.

Crescent Amusement Co., 323 U. S. 173 (1944); *Schine Chains Theaters, Inc. vs. U. S.*, 334 U. S. 110 (1948); *U. S. vs. Griffith*, 334 U. S. 100 (1948); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959).

Despite the obvious intendment of the scope of Petitioner's Complaint, the Stroh Brief (Page 4 to 5) erroneously urges that:

> a. The Complaint does not allege that after the substitution of distributors, Petitioner ever distributed "or intended to distribute, or had any prospect of distributing" beer in interstate or intrastate commerce;
>
> b. The Complaint does not allege that Petitioner and the new distributor were competitors in the distribution of Stroh beer;
>
> c. The Complaint does not allege that Petitioner and the new distributor were competitors in the distribution of any other beer;
>
> d. The Complaint does not allege that Petitioner was or had any intention of becoming, or had any prospect of becoming, in any way a competitor of Respondents or of the new distributor.

The Kohn Brief engages in a similar unwarranted restrictive reading of the Complaint. However, the Kohn Brief fails to agree with the Stroh Brief on *how* restrictively the Complaint should be read. The Kohn Brief complains only that "the complaint * * * does not allege either the existence of any competition between the parties or the suppression of any competition, or any effect upon competition in the market * * *." (Kohn Brief at 4.)

It would seem obvious that the Respondents have engaged in a wholly impermissible denial of the allegations of the Complaint as well as a failure to give it the construction most favorable to the pleader. *Only by denying the allegations that Petitioner was a competitor in commerce*

may Respondents justify the granting of motions for judgment on the pleadings by the courts below. Only from such a premise can Respondents then deduce the conclusion that the Complaint can neither allege any impact upon competition nor furnish an evidentiary basis concerning the effect on commerce or in the market of the conspiracy alleged.

The settled rules of federal procedure demonstrate the impropriety of Respondents' premise—the premise on which the courts below made summary disposition of this litigation. The legal principles controlling a motion for judgment on the pleadings are set forth in *Barron and Holtzoff, Federal Practice and Procedure*, Vol 1, section 359, page 673 as follows:

> "The policy of the courts is to dispose of law suits on their merits whenever possible rather than on motions for judgments on pleadings. Such a motion is proper only *if no material issue of fact is presented by the pleadings* * * *." (Emphasis supplied.)

Accord: Roemhild vs. Jones, 239 F. 2d. 492 (8th Cir., 1957); 5 *Cyc. Federal Proc.*, § 15.225.

By urging upon this Court the premises arising from the denial of the allegations of the Complaint, Respondents underscore both the error in the courts below and the necessity for supervision by this Court.

Both courts below made a wholly unfounded assumption of fact in granting judgment against Petitioner. They *assumed*, despite the clear allegations of the Complaint, that the Complaint alleged a mere substitution of a single product distributor, *not* the destruction by conspiracy of a merchandising competitor. The courts below *assumed*, again contrary to the pleadings, that no market impact would result from the refusal to deal "without more." Hence both courts ignored the achievement, by a wrongful

combination, of the destruction of a competitor and the resulting diversion of the free flow of commerce in a market.

The courts below further violated the well-settled rules announced by this Court for the construction of antitrust complaints. As the Court of Appeals for the Ninth Circuit held recently in *Walker Distributing Co. vs. Lucky Lager Brewing Co.*, 1963 Trade Cases, Par. 70,886:

> "In several cases, the Supreme Court has indicated that we should be liberal in construing antitrust complaints. (See *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 1961 (1961 Trade Cases Par. 69,896), 364 U. S. 656, 659-60 (per curiam); *Radovich v. National Football League*, 1957 (1957 Trade Cases Par. 68,628), 352 U. S. 445, 453-54; *United States v. Employing Plasterers Ass'n*, 1954 (1954 Trade Cases Par. 67,692), 347 U. S. 186, 188-89). In the *Employing Plasterers* case, the Court made it clear that, 'whether these charges be called "allegations of fact" or "mere conclusions of law", * * * they must be taken into account in deciding' whether a claim for relief is stated. (Id. at 188)."

The courts below have departed from the course of decision plainly marked out by this Court.

II

BY THE DENIAL OF PETITIONER'S STATUS AS A COMPETITOR IN COMMERCE, THE COURTS BELOW, IN CONFLICT WITH THE RULINGS OF OTHER CIRCUITS, SEEK TO DEPRIVE PETITIONER OF THE PROTECTION AFFORDED BY THE ANTI-TRUST LAWS FROM CONSPIRACIES AND COMBINATIONS DESIGNED TO PROTECT THE RIGHT OF A COMPETITOR TO ENGAGE IN COMMERCE.

Following the lead of the Courts below, Respondents proceed to "pitch" their briefs upon the two erroneous premises derived from the denial of the allegations of the Complaint:

1. Petitioner, as a single product distributor, is not a competitor; and
2. The conspiracy alleged can have no effect either upon competition in the market or upon market conditions.

With these premises, Respondents find no difficulty in distinguishing from the result in the case at bar the patently conflicting rulings of the Courts of Appeals for the First, Second and Ninth Circuits. Indeed, Respondents would equally find no difficulty in eliminating the many cases that accord to the prospective competitor, the protection of the anti-trust laws against conspiracies designed to inhibit his entry into commerce, e.g., *Gamco, Inc. vs. Providence Fruit and Building, Inc.*, 194 F. 2d. 484 (C. A. 1, 1962); *Vines vs. General Outdoor Advertising Co.*, 171 F. 2d. 487 (C. A. 2, 1948); *Triangle Conduit & Cable Co., Inc. vs. National Electric Products Corporation*, 152 F. 2d. 398 (C. A. 3, 1945).

In line with the clear implication of the rulings from the First, Second, and Ninth Circuits relied upon by petitioner, it is the common understanding of the federal courts that even a conspiratorial destruction of an *in-*

tended business is actionable. The same doctrine applies *a fortiori* to an *established one*. In *Delaware Valley Mar., Sup. Co. v. American Tobacco Co.*, 184 F. Supp. 440 at 443 (E. D. Pa., 1960), the Court held:

> "Section 4 of the Clayton Act authorizes the recovery of treble damages by any person who is injured in his 'business' or 'property' by reason of anything forbidden by the anti-trust laws. Defendants contend that since plaintiff never actually engaged in business, it had no business within the intendment of Section 4. Defendant's argument necessarily presupposes that when Congress authorized treble damage suits it meant to distinguish between the rights of persons who are put out of business and the rights of persons who are kept out of business by a conspiracy. It is unreasonable to suppose that such a distinction was intended by Congress. The purpose of the anti-trust laws is to promote competition and to prevent its restraint. *This purpose is no less thwarted when a person who intends and is prepared to embark in trade is stopped at the outset, than it is when a going business is brought to a standstill. It is as unlawful to prevent a person from engaging in business as it is to drive him out of business. Thomsen v. Union Castle Mail SS. Co.*, 2 Cir., 1908, 166 F. 251, 253. The restriction which defendants would place upon the meaning of the word 'business' is unwarranted in the context of its Clayton Act usage." (Emphasis supplied.)

Respondents proceed to compound their error by arguing that the ruling of this Court in *Klor's* does not mean what it says. Both briefs proceed upon the factually erroneous premise that "the substitution of one distributor for another in a competitive market is not a restraint of trade under the Sherman Act where it does not affect competition." (Stroh Brief at 11.) The Kohn Brief is bolder (Kohn Brief at 14):

"It seems to be petitioner's position that a Sherman Act violation is stated any time that there is alleged 'destruction of the trader's business capability by conspiracy.' (Petition, p. 11). In other words, petitioner would expand the coverage of Section 1 of the Sherman Act to include common law torts against business entities, even in the absence of any effect upon competition in the market or any other effect upon market conditions. *No court has ever interpreted the Sherman Act as meaning what petitioner now says it means.*" (Emphasis supplied.)

Respondents misstate the law. In *Dovberg vs. Dow Chemical Company*, 195 F. Supp. 337 (E. D. Penna. 1963), decided by Senior District Judge Leahy, defendants moved for summary judgment upon a complaint that the defendants conspired to destroy plaintiff's business and thereby to preserve one defendant's dominant position in the wet paste manufacturing business in the Pennsylvania area, and Dow's control of the principal ingredients of plaintiff's cellulose paste. There, as here, the argument was made that the pleader had failed to allege the requisite impact upon interstate commerce within the meaning of the anti-trust laws.

In overruling the contention, Judge Leahy stated at 195 F. Supp. 344:

"The rule, however, of 'effect upon interstate commerce' laid down in *Klor's Inc. v. Broadway-Hale Stores*, 359 U. S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741, and *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co. et al.*, 364 U. S. 656, 81 S. Ct. 365, 5 L. Ed. 2d 358, is very broad. The Supreme Court has stated the rule to encompass any situation where the use of economic leverage through *group* boycott or *efforts* has been used to limit or close an individual entrepreneur's access to supply or disposition of goods in interstate commerce, or used to foreclose market entry or market

operations *regardless of the perceptible market effect.*" (Emphasis supplied.)

Respondents further proceed to compound their error by arguing that there was no *group effort* or *group conspiracy* to destroy petitioner's business. As apparent from the allegations in the Complaint however, the conspiracy in the case at bar proceeded at three levels:

a. The brewer and its agents;

b. Kohn Corporations and personnel other than the new distributor; and

c. The managerial inside persomel of petitioner.

Just as in the *Poller* case, the conspiracy was achieved between the "refuser to deal" and the efforts of independent outside persons and entities other than the new distributor. Hence, the distinction is clear between the case at bar and the suggestion of this Court in *Klor's*:

> "This is not a case of a single trade refusing to deal with another, nor even of a manufacturer and dealer agreeing to an exclusive distributorship." (359 U. S. at 212.)

Obviously, far more than the "normal substitution" of a distributorship occurred.

Respondents' argument thus boils down to the following:

By the mere denial and limitation of the allegations of a Complaint, anti-trust defendants may circumvent the principles of *Klor's vs. Broadway-Hale Stores*, 359 U. S. 207 and *Radiant Burners, Inc., vs. Peoples Gas Light & Coke Co.*, 364 U. S. 656, that *group efforts* to foreclose market entry or market operations in commerce are actionable.

While both Respondents protest to this Court that they are not seeking to resurrect the "public injury" re-

quirement for private anti-trust action, their arguments urge precisely this defense. Such arguments were surely consigned to oblivion by this Court in *Klor's*, when it held that the combination therein stated "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy."

The availability of other products or services, and the availability of other competitors in the market have been repeatedly urged upon this Court—notably in *Klor's* and *Poller*—in mitigation of the anti-trust consequences of the destruction of a competitor. Precisely the same reasons are again urged upon this Court. This time, however, the argument is cloaked under the phrase "no effect upon competition." Obviously, Respondents' argument is again "no public injury."

III.

THE COMMON LAW CONSPIRACY TO DESTROY PETITIONER'S BUSINESS SERVES TO UNDERSCORE, NOT TO CONDONE, THE ANTITRUST VIOLATION.

The briefs of both Respondents urge upon the Court that the presence of possible liability for common law tort serves to dissipate the Sherman Act liability. The Stroh Brief departs from the record in the case to show that petitioner is aware of the Respondents' possible common law liability.

The fallacy of Respondents' argument is transparent. Antitrust violations may be accomplished by a conspiracy or combination consisting of individual acts, each of which, considered separately and apart from the conspiracy or combination, would otherwise be proper. The antitrust violation may also be accomplished by a conspiracy or combination, every step of which is tortious. *A. P. Manage-*

ment Corp. v. Young & Rubicam, Inc., 1962 Trade Cases, Par. 70,254 (S. D. N. Y., 1962). A boycott, for example, is actionable both at common law and under the antitrust laws. It does not follow, however, that the antitrust claimant in *Klor's, Inc.*, could be remanded solely to his common law remedy.

Where the facts of an antitrust case also exhibit the characteristics of common law tort, invariably defendants have urged that only the tort, not the violation of federal law, is before the Court. And almost invariably the argument has been rejected. Most recently, in *North Texas Producers Association v. Young*, 308 F. 2d 235 (C. A. 5, 1962) *cert. den.*, 83 Sup. Ct. 874 (1963) the antitrust conspiracy to prevent the plaintiff from competing in business was accomplished by means of a conspiratorial inducement of a breach of contract.

There, as here, the argument is made that plaintiff's only remedy was in common law tort. As the Court of Appeals stated (308 F. 2d at 238):

> "The thrust of the argument of North Texas on this appeal is not aimed at the existence vel non of a conspiracy, but strongly asserts that *Young did not state a cause of action under the antitrust laws and suggests an action for simple breach of contract.*" (Emphasis supplied.)

The Court of Appeals overruled the contention, pointing out the "myriad of situations demonstrating ingenuity, disguise, intrigue and subterfuge to avoid the appearance of law violation."

In its holding, the Court relied upon the right of the businessman to be free from conspiracy designed to prevent his engaging in business (308 F. 2d at 243):

> "Keith Young was guilty of no lethargy or speculative assertion of a mere wish, desire or intention to engage

> in business. In July he bound himself by the terms of a contract, which the evidence indicates would have been in performance in December. *The alleged conspiracy stopped him cold in November.*" (Emphasis supplied.)

Petitioner seeks only the opportunity to make its proof that Respondents' conspiracies "stopped cold" a viable business in commerce.

Respondents' attempt to "disjoint" the facts. They argue that Stroh had the right to refuse to deal; and that the refusal to deal occurred simply in the context of a common law tort.

Respondents would have this Court overlook the proposition that a refusal to deal in the context of an alleged conspiracy or combination to destroy a competitor in commerce may not be "segmented." As *Poller* held, the refusal to deal is merely a step in the alleged wrongful conspiracy.

CONCLUSION.

Respondents' briefs mirror the basic errors of the rulings of the Courts below. These rulings are conceived in a denial of and a restrictive interpretation of the allegations of the Complaint.

The conspiracy alleged is construed by Respondents as one which does not set forth "a separate and further intent or natural consequence of causing one of those market effects which constitute an unreasonable restraint of trade under the Sherman Act. And Ace's Complaint shows that no such intent or consequence was present here." (Kohn Brief, 17 to 18.)

Respondents' position boils down to the simple proposition that a predatory combination to destroy the competitor in commerce, and thereby to divert the free flow of commerce into a local market, is nonactionable under

the antitrust laws. Until the rulings by the Courts below, it was not the common understanding that the invitation to freedom of competition afforded by the antitrust laws, was also an invitation to combine and conspire to destroy the competitor in commerce.

Respectfully submitted,

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In the Supreme Court of the United States

No. 444.

OCTOBER TERM, 1963.

ACE BEER DISTRIBUTORS, INC.,
Petitioner,

vs.

KOHN, INC., THE KOHN BREWERY CO., PAULINE KOHN, ADAM J. KOHN, STEPHEN ZARICH and PETER ZARICH,
Respondents.

ACE BEER DISTRIBUTORS, INC.,
Petitioner,

vs.

THE STROH BREWERY COMPANY and MORTON R. ENGEL,
Respondents.

PETITION FOR REHEARING.

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Respondents.

PETITION FOR REHEARING.

On November 18, 1963, the Court denied the Petition for Writ of Certiorari in the above case.

The filing of this petition for rehearing is impelled by the decision of the Court of Appeals for the Fourth Circuit in *Osborn vs. Sinclair Refining Co.*, decided November 4, 1963 (1963 TRADE CASES, Par. 70,940), which conflicts with the rationale and result of the *Ace Beer* decision of the Court of Appeals for the Sixth Circuit.

Both in the *Ace Beer* case and in the *Osborn* case, the issue before the respective Courts of Appeals was whether damages are recoverable by a private antitrust litigation

where the refusal to deal was in furtherance of unlawful acts, although *not* in furtherance of monopoly, or conduct which has been traditionally a *per se* violation of the antitrust laws, or other "unreasonable" market restraint.

The issue on the appeal in *Osborn* was stated by Chief Judge Sobeloff as follows:

> "* * * when the District Court came to assess damages, it declared that a refusal to deal was not a per se restraint of trade in violation of the Sherman Act unless done in concert with others as part of a conspiracy (as in Klors v. Broadway-Hale Stores, 359 U. S. 207 (1959)) or unless the unwillingness to deal was in furtherance of a monopoly. *In the absence of conspiracy or monopoly, the Court held that no action could be maintained unless the refusal to deal offended the 'rule of reason' i.e., that it constituted an 'unreasonable' restraint of trade in light of all the circumstances of the case.* The District Court recognized, in accordance with our holding, that the tying arrangement was per se unlawful. It further acknowledged that Sinclair's termination of the lease and the sales agreement with Osborn was in furtherance of that unlawful arrangement. *The court nevertheless took the view that because there was in this case no concerted action or attempted monopoly, and because the cancellation was not 'unreasonable', there could be no recovery for the termination of the business relationship.*" (1963 TRADE CASES at p. 78,745, emphasis supplied.)

The ruling of the District Court in the *Osborn* case was reversed by the majority of the Court of Appeals for the Fourth Circuit.

Chief Judge Sobeloff held:

> "* * * no case has been cited to us, and our research has revealed none, holding that a refusal to deal may be immune in spite of the fact that the seller has violated the antitrust laws and that the refusal to deal

was in furtherance of that violation. The cases are unanimously to the contrary. They show without exception that damages may be recovered for a refusal to deal in furtherance of an arrangement condemned by the antitrust laws, whatever form of trade restraint the arrangement takes. *Although most, but not all, of these cases did in fact involve monopoly or conspiracy, as opposed to non-monopolistic or non-conspiratorial arrangements in restraint of trade, the courts made absolutely nothing of any such distinction.*" (1963 TRADE CASES at p. 78,748, emphasis supplied.)

The Court of Appeals for the Fourth Circuit clearly executed the intendment of this Court in its ruling in *Klor's* and *Parke-Davis* that whenever a refusal to deal is in furtherance of an unlawful antitrust objective, *the competitor is entitled to recover for injury to his business and property irrespective of injury to competition.*

By contrast, in *Ace Beer* the Court of Appeals for the Sixth Circuit was concerned *principally with competition, not with the competitor.* The philosophy of the Sixth Circuit refused to encompass the situation of the competitor who was injured by an alleged violation of the antitrust laws in the form of a conspiracy to destroy the competitor in commerce and wrongfully to divert the flow of commerce, where the violation did not encompass injury to competition.

Said the Court:

"The present case does not involve price fixing. Nor does it involve an attempt to create a monopoly. The Stroh Brewery Company had one distributor in the territory under consideration before it terminated the plaintiff's franchise. It continued to have only one distributor thereafter. There is no allegation or contention that the beer of other breweries was not just as available in that area after the change in dis-

tributors as it was before. See: *United States v. E. I. duPont de Nemours & Co.*, 351 U. S. 377." (Appendix to Petition, pages 32-33.)

> "It is well settled that the 'restraint of trade' referred to in Section 1 of the Act, means only unreasonable restraint of trade, in that, as the cases point out, every commercial contract has some restraining effect upon trade. * * * (citing cases) The substitution of one distributor for another in a competitive market of the kind herein involved does not eliminate or materially diminish the existing competition of distributors of other beers, is not an unusual business procedure, and, in our opinion, is not an unreasonable restraint of trade. * * * (citing cases)." (Appendix to Petition, page 33.)

The conflict between the Courts of Appeals in the *Osborn* case and in the *Ace Beer* case is deep and pervasive. This conflict goes to the heart of the antitrust remedies of the small businessman under the antitrust laws. Where the philosophy of the Sixth Circuit finds harbor, the rights of the small businessman as plaintiff under the antitrust laws will be very uncertain, if not nullified.

Unless this Court clarifies the status of the competitor following a refusal to deal in furtherance of a violation of the antitrust laws which does not accomplish an unreasonable restraint of competition, the rights carefully enunciated by this Court in Klor's and Parke-Davis will prove to be a mirage to the individual businessman.

There are few private antitrust plaintiffs whose elimination can be said to have an effect or impact upon "competition" in any broad or general sense. This Court has presumably consigned to oblivion the requirement of "injury to competition" as the test of the right of the antitrust plaintiff to sue. In *Radovich*, this Court expressly dispensed with the requirement of pleading "injury to competition." In *Parke-Davis* and *Klor's* this Court both by inference and by express holding eliminated from proof any prerequisite of "injury to competition."

Despite the holdings of this Court, in those Districts and Circuits where the "injury to competition" philosophy prevails, the private treble-damage plaintiff has no standing, irrespective of the reason for the refusal to deal. The case of the private plaintiff has foundered on the "public injury" philosophy irrespective of the reason for the refusal to deal:

1. *Price fixing.* In *Tobman v. Cottage Woodcraft Shop*, 194 F. Supp. 83. (S. D. Calif., 1961), the Court held that a complaint alleging a refusal to deal pursuant to a boycotting and price fixing combination failed to state a cause of action. The Court stated:

> "The only injury of any kind claimed to issue from defendants' conduct, is the loss to plaintiffs of $15,000 potential profits from the sale of Ames patio furniture." (194 F. Supp. at 89.)

2. *Boycotts.* In *Arzee Supply Corp. of Conn. v. Ruberoid Co.*, 1963 TRADE CASES, Par. 70,851 (D. Conn., July, 1963), the Court held no cause of action was stated under the antitrust laws by allegations that a manufacturer of roofing materials refused to sell to plaintiff as a result of persuasion and coercion by threats of boycotts by a number of its dealers. The Court put the decision upon two grounds:

(a) failure on the part of the pleader to allege a conspiracy between Ruberoid Co. and the coercing dealers; and

(b) citing the ruling of the Sixth Circuit in the *Ace Beer* case, that the amended complaint "fails to allege that the conduct of the conspiring dealers resulted in market control by Ruberoid, or that this conspiracy drove out the products of competitors of Ruberoid or that the refusal of Ruberoid to deal because of the combination of dealers gave Ruberoid the power to exclude actual or potential competition from the field of roofing materials within the given market." (1963 TRADE CASES at page 78,461.)

3. *The Tying Agreement.* The technique whereby a refusal to deal in the interest of an unlawful tying agreement would result in no remedy to the plaintiff is illustrated by Judge Thompson's rulings in *Osborn v. Sinclair Refining Company* at 171 F. Supp. 37 (D. Md., 1959); and 207 F. Supp. 856 (D. Md., 1962). In the first case, the District Court held that no violation of the antitrust laws was stated. The ground for decision was that no injury to competition was proved.

Following remand by the Court of Appeals for the Fourth Circuit (286 F. 2d 832) the District Court again held that damages were not recoverable by Mr. Osborn since the refusal to deal did not work "an unreasonable restraint of trade." (207 F. Supp. 856 at 863.)

It would seem clear from the foregoing that the philosophy of the Court of Appeals for the Sixth Circuit in the *Ace Beer* case *can operate to destroy any remedy for the small businessman under the antitrust laws—irrespective of whether the source of the injury be a per se violation of the Sherman Act or a refusal to deal in the interest of an unreasonable restraint*. For rarely does the elimination of one businessman or one distributor, or one dealer have an effect upon competition adequate to satisfy the requirements of the Court of Appeals for the Sixth Circuit.

Only where the philosophy of antitrust laws prevails in the District Courts and the Courts of Appeals in accordance with the pronouncements of this Court as interpreted and applied by Judge Leahy in *Dorberg v. Dow Chemical Company*, 195 F. Supp. 337 (E. D. Penna., 1963)[1] can the small businessmen find protection from the refusals to deal in the interest of antitrust violations.

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[1] Judge Leahy stated at 195 F. Supp. 344:

"The rule, however, of 'effect upon interstate commerce' laid down in *Klor's Inc. v. Broadway-Hale Stores*, 359 U. S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741, and *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co. et al.*, 364 U. S. 656, 81 S. Ct. 365, 5 L. Ed. 2d 358, is very broad. The Supreme Court has stated the rule to encompass any situation where the use of economic leverage through *group* boycott or *efforts* has been used to limit or close an individual entrepreneur's access to supply or disposition of goods in interstate commerce, or used to foreclose market entry or market operations *regardless of the perceptible market effect*." (Emphasis supplied.)

CONCLUSION.

Unless this Court resolves the patent conflict between the Courts of Appeals for the Fourth Circuit and the Sixth Circuit, the way has plainly been shown to extinguish the civil remedy for most private antitrust suits pursuant to Section 4 of the Clayton Act.

Respectfully submitted,

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Certificate.

MYRON N. KROTINGER hereby certifies that he is a member of the bar of the Supreme Court of the United States; that the within Petition For Rehearing is presented in good faith and not for delay; and that the Petition is restricted to the intervening circumstances of substantial or controlling effect presented by the conflicting ruling of the Court of Appeals for the Fourth Circuit in *Osborn v. Sinclair Refining Co.*, decided November 4, 1963, 1963 TRADE CASES, Par. 70,940.

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